

**GLOBAL LEGAL CHALLENGES:
COMMAND OF THE COMMONS, STRATEGIC
COMMUNICATIONS AND NATURAL DISASTERS**

CARSTEN

U.S. NAVAL WAR COLLEGE

**INTERNATIONAL LAW
STUDIES**

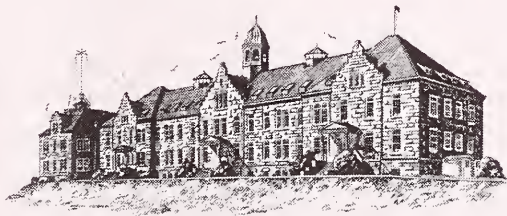
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Global Legal Challenges: Command of the Commons, Strategic Communications and Natural Disasters

Michael D. Carsten
Editor



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EDITORIAL OFFICE

International Law Studies

International Law Department

Naval War College (36)

686 Cushing Road

Newport, RI 02841-1207

Telephone: +1-401-841-4949

Fax: +1-401-841-3989

DSN: 948-4949

E-mail: ILD@nwc.navy.mil

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Foreword

The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the eighty-third volume of the series, contains the proceedings from a scholarly conference entitled *Global Legal Challenges: Command of the Commons, Strategic Communications and Natural Disasters*, hosted here at the Naval War College on June 28–30, 2006.

The conference’s mission was to examine legal standards (or lack thereof) applicable to these challenges and to identify common themes that could guide those responsible for addressing these challenges in the future. By initiating a dialogue between the responsible government officials (military and civilian) and the legal personnel who advise them, the conference developed a number of practical suggestions in the form of lessons learned. One striking aspect of these lessons is that, though the panels dealt with apparently diverse topics, the solutions have many common threads and characteristics. In the truly “global” world in which we live, the challenges must be addressed by solutions that are equally global, coordinated and consistent across the board.

Renowned international scholars and practitioners, both military and civilian, representing government, non-government and academic institutions from throughout the world participated in the event. The conference and this “Blue Book” were cosponsored by the Lieber Society on the Law of Armed Conflict and the Roger Williams University School of Law, Bristol, Rhode Island, with generous support from the Naval War College Foundation and the *Israel Yearbook on Human Rights*. The International Law Department of the Center for Naval Warfare Studies, United States Naval War College, hosted the conference.

On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend to all the cosponsors and supporters, the participants and the contributing authors, our thanks and gratitude for their invaluable contributions to this project and to the better understanding of the complex legal issues involved in meeting and responding to future global operational challenges.

JACOB L. SHUFORD
Rear Admiral, US Navy
President, Naval War College

Introduction

The US Naval War College hosted its sixth annual International Law Conference during June 2006. The purpose of these conferences is to bring together international scholars and practitioners, military experts and students to examine legal issues impacting military operations of the day. Commencing with the inaugural conference in 2001, the Naval War College's internationally acclaimed International Law Studies ("Blue Book") series has been devoted to the conference subjects. This edition of the "Blue Book" continues that tradition. During 28–30 June, 2006, the Naval War College conducted a conference entitled *Global Legal Challenges: Command of the Commons, Strategic Communications and Natural Disasters*. Three main challenges were explored by the conference:

- Threats emanating from the global commons and the need to identify and counter those threats;
- Combat operations in Afghanistan and Iraq, events that occurred during those operations and worldwide perceptions of the US role in and responsibility for those events; and
- Natural disasters of such magnitude international responses were required, including within the United States of America.

This volume of the International Law Studies series is a compilation of remarks made during the colloquium and articles which expand upon the thoughts articulated during the colloquium by the authors.

The conference was organized by Professor Jane Dalton, the Naval War College's Charles H. Stockton Professor of International Law, and Major Richard Jaques, US Marine Corps, of the International Law Department. The conference was cosponsored by the Lieber Society on the Law of Armed Conflict of the American Society of International Law, and was made possible through the support of the Naval War College Foundation, Roger Williams University School of Law and the *Israel Yearbook on Human Rights*. Without the dedicated efforts and support and assistance of these individuals and organizations the conference would not have been possible.

I also thank our editorial team, Professor Emeritus Jack Grunawalt and Captain Ralph Thomas, JAGC, US Navy (Ret.). Their dedication, conscientiousness, and perseverance were principally responsible for the production of this excellent addition to the International Law Studies series. Major Mike Carsten, US Marine

Corps, of the International Law Department served as managing editor of this volume. His dogged perseverance in communicating with contributing authors, marshaling author contributions, packaging the volume, and overseeing the complex publishing and distribution process also are deserving of special thanks. Without their efforts, completing this volume would not have been possible.

Often forgotten when it comes time to acknowledge efforts are the personnel responsible for supervising and executing the expenditure of funds. I thank Colonel Leo “Chip” Boucher, JA, US Army, of the International Law Department and Budget Analysts Ms. Jamie Price and Ms. Mary Ann Hall for their efforts in managing and executing the budget for the conference and this volume.

Additionally, special thanks go to Rear Admiral Jacob Shuford, president of the Naval War College; Dr. James F. Giblin, Jr., the College’s provost; and Dr. Barney Rubel, dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the conference and the publication of this volume.

The International Law Studies series is published by the Naval War College and distributed throughout the world to US and international military commands, academic institutions and libraries. This publication reflects the Naval War College’s commitment to scholarly discourse and a better understanding of legal issues. The 2006 conference and the publication of this volume of the “Blue Book” continue that tradition.

DENNIS L. MANDSAGER
Professor of Law & Chairman
International Law Department

Preface

Jane Gilliland Dalton

Though it is early in this twenty-first century, a number of unanticipated, large-scale events—some man-made, others natural—have brought us face-to-face with the “global” nature of the world in which we live:

- Threats emanating from the global commons and the need to identify and counter those threats;
- Combat operations in Afghanistan and Iraq, events that occurred during those operations and worldwide perceptions of the US role in and responsibility for those events; and
- Natural disasters of such magnitude that international responses were required, including within the United States of America.

Though these apparently unconnected events could be viewed in isolation, embedded within each were issues that could not be addressed by a single nation or a single government agency. The hallmark of these events is the complexity and global reach of legal, policy and operational issues, and the interrelationships among them. In developing the theme and identifying the participants for this conference, *Global Legal Challenges: Command of the Commons, Strategic Communications, and Natural Disasters*, hosted at the Naval War College on June 28–30, 2006, the conference organizers hoped to initiate a dialogue between those who have to meet these global challenges and the lawyers who advise them. We sought to explore the role that law plays in shaping policy, how policy influences legal analysis, and how the interaction of law and policy affect the operational outcomes. The goal was to identify common themes and lessons for future exploration—to learn from past events and experiences how better to approach future challenges.

In addition, this conference did not focus primarily on the laws of war, but rather on legal issues that confront the military commander when engaged in operations that do not fit the traditional concept of warfighting—protecting the homeland from threats, whether natural or man-made, in the post-9/11 environment; ensuring the message one’s forces convey through words and deeds is consistent

with law and policy; and conducting disaster relief operations in a conflicted or insecure area, though not necessarily in a war zone.

The recurring theme of the conference, and, thus, this volume of the “Blue Book” series, is that in an interdependent and complex world of post-9/11 global terrorism, neither policymakers nor military commanders can focus only on domestic or international issues, only on law or policy or operations, only on performing the mission or communicating the message—rather, they have to accomplish all at once. They have to interconnect and interact. The challenges are global and complex. The solutions must be sophisticated and nuanced. From the two keynote speakers and the five panels emerged a number of lessons learned to inform the debate and to assist in developing solutions for the future.

Competing Interests: Striking the Balance

Assistant Secretary of Defense for Homeland Defense Paul McHale’s opening keynote address captured one of the primary themes that resonated throughout the three days of the conference—the importance of striking a balance when dealing with complex issues and competing priorities. In Secretary McHale’s case, the balance is not unlike that America’s founding fathers struck between security and liberty. The founding fathers had to guard against creating a system that relied disproportionately on the military to provide internal security, lest the citizenry’s lack of confidence in civilian law enforcement lead to a voluntary relinquishment of those capabilities in favor of the military, and to a threat to the civilian character of the US government. In the wake of Hurricane Katrina, a similar issue arose. The rapid and effective military deployment to the Gulf Coast—arguably the largest, fastest deployment of military capabilities in US history, according to Secretary McHale—led some to argue the military should be in charge of future emergency responses to domestic natural disasters. Secretary McHale found that identifying the proper domestic role of the military requires “constant, sobering judgment.” “We ought not blindly commit military forces to missions that should remain inherently civilian in character. If we use the military within our own borders for every mission that the military in theory could achieve, we will, in fact, tip the balance towards security and pay a price in terms of liberty.”¹

The luncheon keynote address demonstrated how one executive department of the US government is seeking to strike the proper balance when addressing complex issues with partners, allies and others around the world. Department of State legal adviser John B. Bellinger III, at the request of the secretary of state, has taken a leading role in the secretary’s public diplomacy dialogue. This dialogue is designed to garner support around the world for US policies and the legal

theories underlying those policies related to the global war on terror, the status and treatment of detainees and other post-9/11 issues. Mr. Bellinger noted that some of the challenges in this arena involve dispelling myths that are not based on fact or law and identifying and responding to policy differences that are recast as disputes about the law. Mr. Bellinger's main goals have been to explain with precision and clarity the legal basis for policy decisions and to place unfounded and emotionally laden criticisms in perspective. "Unfortunately," commented Mr. Bellinger, "it is easy to capture a criticism about a complex legal matter in a pithy sound bite . . . but it requires paragraphs of explanation to describe how the United States is, in fact, complying with its legal obligations."² Through his dialogues with legal advisers and other representatives from foreign ministries, the European Union and international organizations, he has encouraged responsible officials and commentators in Europe to "promote more balanced discussion within their own nations, among themselves and with the United States about the issues."³

Secretary McHale recalled that "H.L. Mencken once said that for every complex problem, there is a solution that is simple, neat and wrong."⁴ Just as there is no simple correct solution to the complex issues surrounding the proper role of the military in a domestic context, so there is no simple correct solution to the complex issues Mr. Bellinger addresses when he meets his counterparts overseas. Likewise, the five panel discussions of this conference identified the complexity of the global issues each panel was assigned to address and recognized that there are no simple, clear-cut, easy answers. The solution to these global issues will be found only if competing interests are balanced in a thoughtful, sober analysis of the law, the policy and the operational imperatives. The reader of the contributions in this volume submitted by the panel participants will appreciate the crosscutting themes that animated the discussions and the practical lessons the panelists offered based on their experiences. Following is a short summary of the major themes and lessons learned from the panelists.

See, Understand, Share: Developing Partnerships

"It seems safe to say that global maritime security is now seen by most as a team sport. . . ."⁵ Thus the panel moderator, Professor Craig H. Allen, succinctly captured the primary lesson of the first panel, "Command of the Commons—The United States Perspective."⁶ Vice Admiral Lowell E. Jacoby, US Navy (Ret.), explained why that is so from an intelligence perspective—it is a problem of scale, scope, complexity and the challenges presented by a highly accomplished foe. "Command of the commons" is simply not a realistic goal. "I take this position," said Vice Admiral Jacoby, "based

upon what I believe is a realistic appreciation of what intelligence can achieve. If we attempt to know everything about everything all the time . . . we will fail. . . . Rather, the key is to focus our efforts and dominate those portions of the ‘commons’ that are integral to our priority objectives. The key is to be selective and to prioritize our needs.”⁷

The “see, understand, share” paradigm offered by Rear Admiral Joseph L. Nimmich, US Coast Guard, provides a means to multiply the effectiveness of the focused efforts Admiral Jacoby suggests the intelligence community must pursue. Sharing what is known and understood with all who are stakeholders in ensuring maritime security (federal, state and local governments; agencies of foreign governments; industry partners; etc.) “empowers each player and fosters unity of effort in dozens of ways. . . . This enables each to bring the full force of its unique authority, experience and expertise to the overall effort.”⁸

This panel recognized that new kinds of partnerships involving new kinds of interactions will best meet the requirements to see, understand and share knowledge about the maritime domain and other areas of the global commons. Admiral Jacoby noted with appreciation the close partnership that has to exist between intelligence professionals and legal counsel—a partnership that “must be in place throughout the intelligence process. It must begin with the development of the plan and continue throughout the operation. That partnership needs to be part of the overall plan. It can’t be attached at the end if it is to be effective.”⁹ Rear Admiral Nimmich noted that true awareness and understanding of the maritime domain will only be achieved through a partnership of many government agencies and through the dissemination of information between agencies and other stakeholders.¹⁰

Professor Allen also recognized the need for new sorts of partnerships that are multilateral and interagency, combined and joint, and that involve shared efforts by all those who have a stake in global maritime security. “The advent of regional maritime security initiatives and risk-specific approaches like the Proliferation Security Initiative may portend the new modalities that will replace command and control approaches.”¹¹ But Professor Allen also sounds a cautionary note for legal professionals who advise maritime strategists and policymakers, particularly when the strategists advocate unique and undefined concepts such as “command of the commons.” “[C]ommand of the commons advocates must be alert to several key legal limits on their sea command, control and denial strategies,”¹² and it is their legal advisers who must not hesitate to engage and alert them to these limits. Vice Admiral John G. Morgan, Jr., US Navy, during his remarks, likewise encouraged the legal professionals to engage actively and aggressively in seeking answers to the many questions that arise in the maritime context—how to respect claimed

exclusive economic zones, how to patrol those zones and determine what activities are authorized within them, and how to maintain “unfettered” access to the world’s oceans.

In advocating creative partnerships to enable policymakers and security strategists to see, understand and share their knowledge about threats emanating from the global commons, the moderator and panelists for this first panel all returned repeatedly to the theme of the two keynote speakers—the imperative that these complex and global issues must be addressed by striking a balance between competing forces and competing interests. The need for security in the maritime domain must be balanced with the need for freedom of movement and action there; the need for information must be balanced with the impossibility of knowing everything about such vast areas; and the need for command and control must be balanced with the need to work cooperatively with others who have interests in those same areas. As Rear Admiral Nimmich noted during his remarks, what is required is a change from a “need to know” culture to a “need to share” culture, from operating on a national basis to operating on a global basis. These challenges will face those operating in the global commons—the oceans, airspace, outer space and cyberspace—now and into the future.

Threats from the Global Commons: Closing Gaps and Seams

The second panel of the conference, “Command of the Commons—The International Perspective,” carried forward the themes of balance and partnership and provided an international perspective on how best to close the gaps and seams that exist in our ability to effectively counter threats from and in the global commons. Based on a rich discussion of several specific issues, this panel identified a number of “gaps and seams” in the current legal regime and developed a mosaic of practical suggestions for those concerned about security in the maritime domain and in the global commons as a whole.

Professor Stuart Kaye highlighted the considerable legal authorities that nations have at their disposal to protect their ports, their shipping and their nationals from attack. He surveyed several recent international conventions and protocols that have enhanced the authorities available to port, coastal and flag States. Yet he cautioned that “States have yet to create protection for the totality of activities that take place beyond the territorial sea. Adequate jurisdictional mechanisms to ensure an effective response to attacks on submarine cables and undersea pipelines do not exist, nor does it appear there are international efforts in progress to remedy the situation.”¹³ Professor Kaye’s theme is that international law provides States with the tools necessary to respond to these threats, but States must move cooperatively to

actually put in place legal measures designed to protect submarine cables and pipelines from terrorist threats, and to better cooperate in sharing data and intelligence.

Rear Admiral Jorge Balaesque, Chilean Navy (Ret.), and Professor Francisca Möller offered the Chilean “Mar Presential” as a precedent for the recent US Maritime Domain Awareness strategy. Consistent with the United Nations Convention on the Law of the Sea and freedom of navigation rights on the high seas, the Mar Presential represents Chile’s efforts to protect national interests and take part in economic activities that contribute to national development. Quoting the *Chilean Defense White Book*, these panelists explained that “[t]his concept expresses the will to be present in this part of the high seas with the aim of projecting maritime interests regarding the rest of the international community, watch over the environment, preserve the natural resources, with exact adherence to International Law.”¹⁴ But they also stress that mere presence is not enough. Like Professor Kaye, they recommended more multilateral cooperation to create a legal regime that addresses a particular problem—in this case, a legal regime that would make proliferation of weapons of mass destruction a global crime, like slavery or piracy.

Professor Yann-huei Song discussed some very encouraging developments in maritime cooperation by the littoral States of the Strait of Malacca. Since July 2004, Indonesia, Malaysia and Singapore have launched the Malsindo Coordinated Patrol (MCP) program (routine sea and air patrols by the maritime security organizations of these three States) and “Eyes in the Sky” (air patrols over the Malacca Strait) to curb piracy and increase security. These, among several other multilateral and bilateral initiatives, were undertaken in response to the increasing demand from Malacca Strait user States and the international community for more effective law enforcement measures to deal with the problem of piracy and possible maritime terrorist attacks. The tripartite patrol is “an open arrangement with opportunities for the international community to participate” and India has offered to assist.¹⁵

Yet there are numerous gaps and seams that require more effective multilateral cooperation: cross-border hot pursuit, maritime patrols in each other’s territorial seas, and sharing information and intelligence. When considering why those gaps and seams still exist, it becomes apparent that sovereignty must become an enabler of security, not a barrier to it. Professor Song quoted the secretary-general of the International Maritime Organization, who noted in September 2005: “[w]ith regard to the question of security versus sovereignty . . . , while I can understand and fully respect the sensitivity of any State over the issue, I also believe that, whilst States have the right of non-interference in their internal affairs, they also have concurrent responsibilities towards their own people, the international community and their international engagements. Whatever the answer to this, there can be

no excuse for inactivity, whether the danger is clear and present or perceived as a future possibility.”¹⁶

Sovereignty was also a dominant issue in Professor Bakhtiyar Tuzmukhamedov’s analysis of the 2006 Russian Federation law, “On Counteracting Terrorism.” “In a conspicuous departure from the Soviet-era official and doctrinally strict, i.e., narrow, interpretation of the right of self-defense, Russian officials have, since 2002, increasingly been indicating that it might be permissible to use armed force against extraterritorial sources of imminent threat to Russian security, even in the absence of an actual armed attack originating from those sources.”¹⁷ The law appears to be aimed, at least in part, at potential threats coming from the Pankissi Gorge in Georgia, an area some Russian officials believe to be “an area where Georgian law and order was nonexistent.”¹⁸ Professor Tuzmukhamedov analyzed whether the law, by its terms, contemplates preemptive actions to deal with threats that are not necessarily imminent. Whatever the letter of the law, however, some, such as Defense Minister Sergey Ivanov, appear to believe the spirit of the law provides sufficient grounds for “unilateral and preemptive” use of force against terrorist targets on foreign soil. If that is so, Professor Tuzmukhamedov poses a provocative question: “As more nations, some of them bearing enormous might, submit that they would use armed force in self-defense not only to react to an actual attack, but also to preempt imminent assault, or even prevent it from materializing in the future, would it not give impetus to claims that a customary rule of international law has already been conceived?”¹⁹

Professor Yoram Dinstein, in his remarks, identified computer network attacks occurring in that part of the commons known as cyberspace as a relatively new method of warfare and an area that represents a lacuna in the law. A computer network attack does not appear to fulfill the generally accepted requirement that an “attack” constitute an act of “violence.”²⁰ Thus, with respect to the *jus ad bellum* (or law governing the resort to force), the crucial question is whether a computer network attack by itself can amount to an “armed attack” as contemplated under Article 51 of the United Nations Charter. Of course, the Security Council, acting under Chapter VII of the Charter, can determine that any act, including a computer network attack, constitutes a threat to the peace. However, absent a Security Council determination, the question arises whether a computer network attack against a State can trigger a lawful forcible response in individual or collective self-defense under Article 51.

Yet, in addition to serving as a method to gather intelligence or to blind the enemy and otherwise disrupt its communications, a computer network attack can also produce devastating and deadly effects if a belligerent party gains actual control of an opponent’s computer network (such as by launching the opponent’s

missiles against its own assets, opening the sluices of dams to cause a flood, or even causing a meltdown of the adversary's nuclear power reactors). Further, identifying the party actually responsible for a computer network attack can be time consuming and fraught with difficulties. Hence, responding promptly to such an attack from an ostensible source is very dangerous, for a terrorist organization could use a computer network attack—through a third party's computer network—with a view to inducing State A to respond against State B, which is actually an innocent party.

On the whole, concluded Professor Dinstein, the computer network attack issue is complex, the possibilities are enormous and international lawyers are decidedly behind in their study of the full dimensions of this new phenomenon. In truth, the same could be said about all the gaps and seams identified by these panelists. There is much work to be done to close them and the lawyers who advise policymakers and operational experts can play a major role in shaping appropriate solutions.

The Military and the Media: Shaping the Public Debate

The second day of the conference dealt with communications—how best to communicate one's legal theories, policies, strategies and goals in these very complex situations to a public that is accustomed to instant access and instant analysis: how best to counter a “pithy sound bite” on an issue that requires pages of analysis to understand and convey. The first panel of the day, “Public Perceptions and the Law,” concluded that public discourse today is marked by “more heat than light.”²¹ Though the panelists differed concerning who bears the greatest responsibility for creating that equation, they unanimously agreed that all stakeholders have an important role to play in shaping improvements.

U.S. News & World Report senior writer Linda Robinson commended the military for adopting “effective policies that help provide news media with access to the battlefield, senior officials and other events and voices that merit coverage.”²² Providing more access and information assists the press in producing “better informed and more in-depth coverage and analysis.”²³ It is then incumbent upon the media to conduct the necessary sustained research to enable only the most accurate and unbiased reporting. Professor Harvey Rishikof looked to the courts to help pierce the “fog of confusion” on some of these complex legal issues and to strike the necessary balance among leaks, information flow, national security, the First Amendment and the right to know.²⁴ The resolution of some of these contentious issues will help shape the debate for the future, hopefully in a more calm and studied manner, and may inform the public more accurately on these complex legal matters.

Colonel James P. Terry, US Marine Corps (Ret.), called for the military and the media to work together to find practical solutions to areas of friction in communication between the two. “[O]ur ultimate quest must be how can we maintain a vibrant, robust freedom of expression while protecting the nation’s capacity to fight our wars effectively.”²⁵ Colonel Terry challenged the media to make a more concerted effort to understand and to explain the legal issues involved, such as the difference between “terrorists” and “insurgents,” how women and children who participate actively and directly in support of combat activities themselves become combatants, and why a civilian family providing safe haven for a terrorist in its home subjects the home to a loss of protected status.²⁶ As Ms. Robinson pointed out, “[t]he public policy debate would greatly benefit from more sustained efforts to understand what is an extremely complicated conflict that has eluded easy answers.”²⁷

Professor Robert F. Turner recalled that the Vietnam conflict demonstrated that it is possible to win every major battle and nevertheless lose a war if the enemy destroys the national will through propaganda, public diplomacy or what Leninists called “political struggle.” Professor Turner, in his remarks, noted that having the moral high ground is critically important to Americans and their widespread ignorance—including that of members of the legal profession—about applicable laws of armed conflict is a major impediment. The principle that enemy combatants may be lawfully detained without charge for the duration of the hostilities is lost on many. While public and media education about the law of armed conflict (as well as relevant constitutional and statutory law) is important to this process, it is equally important that the government and the armed forces strive to obey their obligations under international law. Public support is crucially important in every sustained conflict and the media is a primary source of information for the public. To maintain this support, the country needs to have moral authority on its side and, when mistakes are made, needs to be honest and open and promptly correct them.

The major theme and lesson learned from this first panel on communications was that all those involved—the media, the judiciary, the government, the armed forces, the lawyers who advise these organizations and institutions, and the public—must make a concerted effort to fully understand the legal issues involved and to accurately appreciate and convey the full extent of the legal complexities as they address the issues. Recalling State Department legal adviser John Bellinger’s luncheon remarks, it is imperative that all engage in a “more balanced discussion.”

Strategic Communications: Converging on a Message

The second panel on this topic, “Challenges of Strategic Communications,” very quickly identified a primary lesson for policymakers, legal advisers and those who

conduct operations—the imperative to have a single national process to move with singular purpose to promulgate a consistent message.

Rear Admiral Frank Thorp IV, US Navy, likened this process to a symphony: every element of national power, everything the government says and does, must be synchronized. The professional communicators alone cannot successfully direct this process—the policymakers and those who carry out the policy must be involved. Policy and actions must agree, because inconsistency means failure. The greatest strategic communication challenge, however, is to create good policy in the first place. The legal community's role is crucial to the success of this effort to ensure that the policy is legally sustainable and supportable and to ensure that those who carry out the policy are trained in their legal obligations. Rear Admiral Thorp identified three objectives essential to a successful communications process for the Department of Defense. He suggests that the department must: 1) create a “culture of communication” within the department; 2) develop a strategic communication doctrine that defines roles, responsibilities and relationships; and 3) provide the military services and the combatant commanders with the necessary resources to enable them to create the processes to properly conduct strategic communications. Then, the Department of Defense must work with the other elements of national power to coordinate information, themes, plans, programs and actions.

Professor Gene Bigler concurred that successful strategic communications require a unified process. He called this process “convergence,” which is more than simply getting all the messages on the same page, but involves insuring the messages are in harmony with people's expectations about those delivering the messages.

Thus it is not just that the messages from the White House and DoS and DoD need to be consistent with those from the presidency, as that these all need to harmonize with people's expectations about the actions and values that America represents. Convergence, then, speaks to the coincidence between message and behavior in order to enable strategic communications to achieve the persuasive capacity or provide the desirable model. . . .²⁸

Particularly given the complexity of legal issues and lawyerly discourse, Professor Bigler suggested that the Departments of State and Defense must present a more balanced and unified message, one that takes into account the audience's capacity to understand the issues and its expectations of the values for which the United States stands.

Brigadier General Mari K. Eder, US Army, echoed this sentiment by expressing concern that too often “the US Government sends ‘mixed messages’ or fails to

clearly and consistently communicate policy.”²⁹ Brigadier General Eder repeatedly stressed the need to forge a more resilient partnership among public affairs professionals, warfighters, policymakers, even the private sector, to better enable the United States to communicate its policies quickly and effectively in a way that resonates with the intended audiences. Likewise, Rear Admiral Michael A. Brown, US Navy, espoused “an agile and coordinated approach both horizontally and vertically through all levels of government. We can no longer focus on single areas of responsibility—every action or inaction has the potential to be global in nature.”³⁰ Rear Admiral Brown also stressed the importance of developing a rapid response system: “Slow ‘official’ response damages credibility and undermines what is eventually released. We must plan from the beginning with an effects-based model derived from our strategic goals.”³¹

Professor Craig Allen’s article in this volume, concerning the conference’s first panel on “Command of the Commons,” envisions a worst-case scenario where the synchronized strategic communications process falls out of sync. In his example, an ill-advised communications plan, lacking appropriate legal and policy contexts, could result in unanticipated negative reactions from the international community. He suggests that just as the US Navy uses war games to analyze the efficacy and viability of various political and military strategies, so too could war games be used to analyze whether a strategic communications plan is, in fact, synchronized with a singular purpose to convey a consistent and appropriate message. Decisionmakers could subject a catchphrase such as “command of the commons” to red-teaming to assist them in understanding the possible reactions worldwide to such a statement.³² This practical suggestion, resulting from the dialogue among the conference participants and panelists, demonstrates how the three major topics of the conference are connected and how lessons learned in one area of global challenge may have benefit for policymakers and the operational forces responsible for activities in other areas.

Disaster Response: Harmonizing Legal Structures

The fifth and last panel of the conference, “Global Disasters,” tackled an area that itself could dominate an entire conference. The issues involved are so complex, so urgent and, unfortunately, so intractable that one wonders whether there will ever be a coherent legal structure capable of meeting the needs of both the disaster-stricken country and those seeking to provide relief. Many of the themes discussed in other panels arose again in this context—that assertions of national sovereignty often prevent effective and rapid response, that unity of command must inevitably give precedence to unity of effort. The law as an enabler of operations was a common theme, though more often than not the various legal structures (local,

national and international) are not harmonized to optimize the number of lives saved or amount of suffering relieved. And within the United States and throughout the international community there is considerable debate whether the military is the most appropriate organization to provide disaster assistance, for both legal and policy reasons. This debate is similar to that concerning the proper role of the military in strategic communications and in “command” of the commons, where similar legal and policy considerations arise.

Mr. David Fisher, of the International Federation of Red Cross and Red Crescent Societies, explained that despite the number of international instruments—at the global, regional and bilateral levels—and important non-binding guidelines, models and codes, there still is no coherent international disaster relief system. As a result, legal obstacles to the entry and operation of international relief often exist and monitoring, coordination and regulation of international aid is generally inadequate. These problems bedevil not only those seeking to provide relief to underdeveloped parts of the world but also prevented the delivery of humanitarian aid to the United States in the aftermath of Hurricane Katrina.³³ The island nation of Fiji, however, proves that progress can be made. After Fiji established a detailed legal and regulatory structure for international relief, subsequent disaster operations experienced few coordination problems.³⁴ Fortunately, international disaster relief is an area where lawyers can take and are taking the lead to bring coherence to the process. The International Conference of the Red Cross and Red Crescent is to take up a series of recommendations on these issues in November 2007 and the United Nations International Law Commission has placed the “protection of persons in natural disasters” on its long-term program of work.³⁵

Speaking as one whose nation had recently experienced a disaster of global magnitude, Brigadier General Ikram ul Haq of Pakistan reflected on the institutional and informational vacuums that resulted immediately after the October 2005 earthquake.³⁶ A lesson learned from that experience is that those vacuums could be more effectively managed if mechanisms were already in place in the form of peacetime agreements with friends and allies. Such agreements could address not only the specific capabilities that a particular nation could bring to the relief effort, but also could establish procedures and schedules for joint mock disaster relief exercises. Brigadier General ul Haq also suggested that a “multinational forum to share disaster relief and recovery experiences” would be helpful in enabling nations who have suffered such disasters to learn through others’ experiences.³⁷

Lieutenant Colonel Evan Carlin, Australian Defence Force, observed firsthand the difficulties in monitoring, coordinating and regulating international relief efforts after the 2004 Boxing Day tsunami in Indonesia. A primary concern of Australian, Singaporean and American military relief forces, a concern unfortunately

not shared by all relief providers, was “to ensure that the relief effort was in accordance with Indonesian priorities. . . .”³⁸ “Indonesians knew best what Indonesians required. . . .” stated Lieutenant Colonel Carlin.³⁹ Like Brigadier General ul Haq, he emphasized the importance of sharing information. Those involved in the relief efforts needed to know “the progress of the mission, road conditions, security concerns, aid priorities, bottlenecks and expectations.”⁴⁰ But an important, and even greater, challenge was to inform the rest of the world of Indonesian needs, to prevent well-intended but misguided efforts.

Both Captain Kurt Johnson, JAGC, US Navy, and Mr. Gus Coldebella of the US Department of Homeland Security reinforced the importance of coordination and cooperation in arriving at practical solutions to pressing problems in a disaster situation and addressed some of the challenges involved in monitoring, regulating and coordinating relief efforts. Mr. Coldebella observed that, while the nature and speed of communications now gives almost all large natural disasters a “global” character, all disasters are profoundly and basically local. The US approach is for disasters to be handled in the first instance at the lowest jurisdictional level possible. The National Response Plan, adopted only eight short months before Hurricane Katrina struck, provides the structure for federal, state and local governments to work together. Given the plan’s adoption date, however, there was little opportunity for exercises based on the plan before the plan actually had to be implemented in a disaster. Further, Hurricane Katrina caused a situation in which, at least for a time, there was no state or local apparatus to request, accept and coordinate federal assistance, which caused initial difficulties. But because the National Response Plan contemplated such a situation, it allowed federal assets to be moved where needed without waiting for a state request.

Captain Johnson elaborated on a theme first introduced by Secretary McHale and discussed by other panelists from an international perspective—the proper role of the military in providing disaster response. His analysis of the various domestic laws involved clarified the careful legal analysis that will be required, based on the specific facts of each situation, to determine the Department of Defense role and authorities in the wake of future major natural disasters. He also acknowledged that challenges attended the acceptance of international assistance, such as medical credentials for international medical personnel, Department of Agriculture food regulations concerning food from foreign nations, gift acceptance authority and rules for the use of force that foreign troops on the ground were to employ.⁴¹

The harmonization of legal structures in the disaster relief area will be complicated and time consuming. It will require efforts at the international, national and local levels, and must be tailored to accommodate the governmental system, cultural mores and social priorities of each country. Lawyers, policymakers and those

who carry out the policies should focus on developing coordination and unity of effort rather than seeking unity of command. The appropriate role of the military should be addressed, as well as the most effective way to monitor, coordinate and regulate the provision of aid from the international community. Sovereignty concerns should be proactively harnessed to facilitate the rapid and comprehensive delivery of relief, rather than serving as a barrier thereto. In this area of global challenge the law truly can serve as an enabler of all that is desirable and beneficial to mankind. Lawyers can, and should, take the lead in this area to guide national and local leadership to constructive and creative solutions.

Conclusion

There are many people to thank for their roles in bringing this work to fruition. Foremost are the cosponsors, the financial contributors and the participants in the conference from which this book is derived. My thanks to Professor Dennis Mandsager, chairman of the Naval War College's International Law Department, for his support, counsel and guidance during the planning and coordination of the panels, the participants and the presentations. This eighty-third volume of the International Law Studies series would not have been possible without the constant and dedicated assistance of Major Michael D. Carsten, US Marine Corps, of the International Law Department; Captain Richard J. Grunawalt, JAGC, US Navy (Ret.); and Captain Ralph Thomas, JAGC, US Navy (Ret.), who shepherded the publication from first draft to completion and handled the myriad administrative details involved in publishing a work of this caliber. Thanks also to the unsung, but always outstanding, efforts of Ms. Susan Meyer in Desktop Publishing, and the incredible proofreading from Susan Farley, Albert F. Fassbender III and Heather M. Lightner, and publication support from Ms. Valerie Butler. It is only due to these individuals' efforts that the International Law Department is able to bring you this volume. However, there are sure to be errors, and these are my responsibility alone. Finally, a special note of thanks to my husband, Harvey, who enthusiastically encouraged me to serve as the Stockton Professor of International Law, though it meant yet another Navy "geo-bachelor" tour, and to former Stockton Professor Howard Levie—whose clarity of legal thought and writing continue to inspire all who work in this area of international law.

Notes

1. McHale, *infra*, at 7.
2. Bellinger, *infra*, at 209.

3. *Id.* at 208.

4. McHale, *infra*, at 16.

5. Allen, *infra*, at 32.

6. There is no generally accepted definition of the “global commons.” The negotiators of the United Nations Convention on the Law of the Sea frequently used the phrase to denote those areas of the oceans and seabed beyond the jurisdiction of any nation. Today, the phrase is often extended to encompass space, cyberspace, and even “ungoverned spaces” such as Somalia and the Pankissi Gorge in Georgia. *See, e.g.,* Jacoby, *infra*, at 52, *and* Tuzmukhamedov, *infra*, at 84. In his prepared remarks, Vice Admiral Morgan suggested that even the global economy could be considered a part of the global commons in that today’s world order is economy based and “one of the greatest dangers that the world faces right now is the collapse of the global economy.” The concept of “command of the commons” has recently surfaced in some US doctrinal discussions. *See, e.g.,* Allen, *infra*, at 30–33. Because at first glance the phrase appears to be inconsistent with traditional notions of freedom of the seas and sea lanes of communication, the organizers of this conference chose the topic to prompt debate and facilitate discussion concerning how one goes about protecting against threats emanating from the global commons.

7. Jacoby, *infra*, at 53.

8. Nimmich & Goward, *infra*, at 62.

9. Jacoby, *infra*, at 55.

10. Nimmich & Goward, *infra*, at 63.

11. Allen, *infra*, at 32.

12. *Id.* at 34.

13. Kaye, *infra*, at 77.

14. Möller & Balaesque, *infra*, at 164.

15. Song, *infra*, at 125.

16. *Id.* at 128.

17. Tuzmukhamedov, *infra*, at 84.

18. *Id.*

19. *See id.* at 90.

20. *See, e.g.,* Article 48, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Attack means acts of violence against the adversary, whether in offence or in defence.”)

21. Robinson, *infra*, at 198.

22. *Id.* at 200.

23. *Id.*

24. Rishikof, *infra*, at 185.

25. Terry, *infra*, at 188.

26. *Id.* at 194.

27. Robinson, *infra*, at 200.

28. Bigler, *infra*, at 225.

29. Eder, *infra*, at 236.

30. Brown, *infra*, at 251.

31. *Id.* at 252.

32. Allen, *infra*, at 37.

33. Fisher, *infra*, at 302.

34. *Id.* at 306.

35. *Id.* at 310.

36. ul Haq, *infra*, at 258.

- 37. *Id.* at 265.
- 38. Carlin, *infra*, at 271.
- 39. *Id.*
- 40. *Id.*
- 41. Johnson, *infra*, at 288.

PART I

KEYNOTE ADDRESS

I

Domestic Security and Maintenance of Liberty: Striking the Balance

Paul McHale*

Introduction

We have seen extraordinary changes in the role of the military within domestic American society since September 11, 2001. The National Defense Authorization Act of 2003 created the office that I now hold. The statutory mission assigned to the assistant secretary of defense for homeland defense was—and is—to supervise all of the homeland defense activities of the Department of Defense. In short, to supervise the domestic role of the US military, to include both the warfighting defense of the United States and the consequence management activities of the Department of Defense when providing support to civilian authorities. That is a sobering mission. It reflects the intent of Congress to bring a special geographic focus to the department that reflects the paramount security considerations associated with the immediate defense of the American people. It is a mission that sobers me every morning.

Constitutional Principles

When I was asked to take this position I thought seriously about the role of the military within domestic society, the historic and statutory constraints upon that role and the appropriate opportunity within the boundaries of those constraints for the

* Assistant Secretary of Defense for Homeland Defense.

US armed forces to make a contribution to the physical security of the American people. It required me to re-examine some first principles of constitutional government and the effective protection of civilian democratic principles so deeply embedded in our US Constitution.

With that as motivation, I returned to the Federalist papers. I served three terms in the House of Representatives in the 1990s. When I left the House, I decided to read the Federalist papers in their entirety. Like many political science majors, I had read portions—Federalist 10 and Federalist 51—but I had never read all eighty-five from beginning to end.

I think most of you participating in this conference are familiar to at least some degree with the Federalist papers. For those of you in the international community who may not be familiar with them, just let me briefly set the stage. Over the summer of 1787 the Constitution of the United States was written in the city of Philadelphia. The framers of the Constitution finished their work in September 1787. Then the question became whether or not the required nine of the original thirteen states would ratify the framers' work. As in any political context there was serious debate, on this occasion between the federalists and the anti-federalists. That debate was carried on in the newspapers of the day. Between the time of the completion of the draft and the ultimate ratification of the Constitution, Alexander Hamilton, James Madison and John Jay—principally Hamilton and Madison—wrote eighty-five op-ed pieces. Those commentaries were ultimately bound together into the published work that we know today as *The Federalist*.¹

There are legal scholars who believe that *The Federalist* may be the finest work of legal literature ever written in the English language. A few years ago Professor Bernard Schwartz, Chapman Distinguished Professor of Law at the University of Tulsa, came up with his list of the top ten legal books ever written in the English language; at the top of the list was *The Federalist*.² I'm not sure that I would go that far, but I knew when I retired from Congress I wanted to read the Federalist papers. I knew that the only way in which I would have the discipline to do so would be if I volunteered to teach a course on the Federalist papers at one of the colleges in my hometown. So I returned to Pennsylvania and taught a course on the Federalist papers for a year or so staying about three papers ahead of the students and developing my expertise in explaining their meaning.

Federalist Paper No. 8 talks with specificity about the role of the military within the borders of our nation; it is a cautionary message. When I first read Alexander Hamilton's words I thought they were an anachronism. He was concerned that the role of the military would become too intrusive within domestic American society. He feared that if that role were to be too powerful the character of our nation and

the core principles of the Constitution would be adversely affected. Those fears were expressed in the following words (to which I have added my own thoughts):

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war [think September 11], the continual effort and alarm attendant on a state of continual danger [think al-Qaeda], will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.³

Later in Federalist 8 he talks very specifically about the US military in a manner that, I think, was prescient. When I studied government in college and first looked at the Federalist papers and first considered the role of the military, I knew there was concern among our founders related to a large standing army. The implication was that a large standing army would by brute force impose military values upon a civilian government and a republican Constitution. The force of arms would be seen as the danger.

That is not the rationale of Federalist 8—it's much more sophisticated, much more nuanced. It is not about brute force; it is about the choice to sacrifice liberty in order to achieve security. Hamilton wrote about nations that are internally secure from external attack, as opposed to nations which remain internally subject to foreign attack; again think al-Qaeda. The twenty-first-century reality, at least from our perspective within the Department of Defense, is that the United States is now an inherent, integrated element of a global battlespace from the vantage point of transnational terrorists.⁴ Indeed, I think it could be argued successfully that, from the terrorist standpoint, we are the pre-eminent element of that battlespace. Their intent is not to achieve victory through a war of attrition but to bring brutality into the internal confines of the United States. By bringing death and destruction to our citizens, they believe they can affect our political will. Well short of success in terms of attrition, they believe they can shape our political conscious by acts of brutality and if they can succeed in engaging in such acts within the United States they will have achieved pre-eminent success.

Alexander Hamilton wrote of nations that must fear that kind of internal attack versus those that are relatively secure within a domestic setting. Let me take those in reverse order the way Hamilton did. He wrote, "[t]here is a wide difference . . . between military establishments in a country seldom exposed by its situation to internal invasions. . . ."⁵ A recent example of such a country would be the United States during the Cold War when there was little danger of attack upon our territory. In this, the first case, the civil state remains in full vigor:

The smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery; they view them with a spirit of jealous acquiescence in a necessary evil. . . .⁶

Hamilton then goes on to address, by contrast, the state of a nation that is “often subject to them [internal invasions], and always apprehensive of them.”⁷ Since September 11, 2001 we in the United States, on a daily basis, remain uncertain as a matter of harsh reality as to when and under what circumstances our transnational terrorist adversaries might again strike us internally. Three thousand people were killed on our own soil on September 11th. Another attack could conceivably occur tomorrow so we remain subject to that continuing threat. Describing a nation in that circumstance, Hamilton wrote (again with the insertion of my thoughts):

In a country, in the predicament last described, the contrary of all this happens. The perpetual menacings of danger [al-Qaeda] oblige the government to be always prepared to repel it. . . . The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil. The inhabitants . . . are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees, the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them as masters, is neither remote, nor difficult. But it is very difficult to prevail upon a people under such impressions, to make a bold, or effectual resistance, to usurpations, supported by the military power.⁸

Hamilton’s concern was that if we allowed ourselves to get to the point where we were disproportionately dependent upon the military for internal security then we in the military would become the saviors of society and citizens would no longer trust civilian government to provide for their physical security. The citizenry would conclude, perhaps correctly, that only the military could provide for its internal security. Once that recognition occurred, the military would be seen as the masters and, ultimately, the leaders and superiors of society. In short, not brute force but rather the voluntary relinquishment of the civilian character of our government would raise the role of the military disproportionately and ultimately threaten the civilian character of our Constitution. It would not be by force but by choice that the character of our nation would change because of the core mistake of allowing a disproportionate dependence upon military power for internal security, rather than a core dependence upon civilian law enforcement and civilian capabilities to guarantee that same security.

Striking the Balance

Those were sobering thoughts for me when I was nominated for the position in which I now serve and those have remained sobering thoughts guiding me and many others with whom I work. On a daily basis we consider the roles of the military and civilian government and civilian capabilities when achieving security within our own borders. Obviously when we begin to address national security issues in terms of power projection and the ability to take the fight to the enemy overseas, the role of the military historically has been dominant. In my judgment that is correct. When we seek out terrorists and their supporters in places like Afghanistan and Iraq, men and women in military uniform are at the vanguard of our nation's effort to achieve physical security. We send men and women in the armed forces forward in a lead role to engage the enemy and defeat such enemy attacks. But within our own country, it remains an issue of constant, sobering judgment to remain loyal and committed to the preservation of the civilian character of our government and the democratic nature of our Constitution, and, within that balance, properly employ the military in a manner that will enhance our security, while ensuring it remains ultimately subordinate to clear and decisive civilian authority, which in turn will ensure the civilian character of our government. That is the nature of the challenge. There are many things we can do with military power within our own borders in order to achieve the security of the American people while not endangering the civilian character of our Constitution. But that is a continuing issue of sober assessment. We ought not blindly commit military forces to missions that should remain inherently civilian in character. If we use the military within our own borders for every mission that the military in theory could achieve, we will, in fact, tip the balance towards security and pay a price in terms of liberty.

Thus, the question becomes how do you strike that balance? The remainder of my remarks will touch upon certain specific areas of operational activity where there are significant legal implications. But as I go through these challenges, both operational and legal, in each and every case I urge you to consider them in the continuing context of that balance between security and liberty and between the role of the military and the role of civilian government within the boundaries of domestic American society. Underlying the determination of that balance is the overarching requirement that those roles be consistent with the civilian core principles of the US Constitution.

Homeland Security

It became operationally clear—indeed it was instinctively obvious—that in light of the attack we had experienced on September 11th there was a need for enhanced physical security within the borders of our nation; the enemy had struck and might do so again. The Department of Defense, acting with operational prudence, created rapid reaction forces that could act within our own country. US Army and Marine Corps forces, in a classified number, were placed on alert for potential domestic deployment of military force in order to defeat a follow-on al-Qaeda attack. It was clear that having struck us once the enemy might strike us again and that there was a role for military power in defeating such a foreign attack on our soil.

When I was confirmed as assistant secretary of defense for homeland defense and began to exercise the responsibilities and authority of supervising the homeland defense activities of the Department of Defense, I determined that having rapid reaction Army and Marine Corps ground forces on alert for domestic deployment was a reasonable course of action. But as a lawyer I asked myself, “Is that constitutional?” Is the ground deployment of US Army forces consistent with the Posse Comitatus Act of 1878?⁹ How do we deploy soldiers on our own soil in a manner consistent with the Constitution when to do so may potentially conflict with the posse comitatus statute?¹⁰ How do we reconcile the need to defend against another potential al-Qaeda attack with the Constitution and the law?

I know there are individuals in the audience today from a nation-State that is today an extremely close friend and ally of the United States. But in 1812 that nation-State—I am not going to say which one—deployed ground forces to the United States. Those ground forces left, shall we say, a lasting impact upon the Capitol of our nation. While those forces were en route to the capital, US Marines were employed at Bladensburg, Maryland to defend against that attack. We were not quite as successful as we hoped we would be, but we utilized US military forces to defend our own soil under the same Constitution with which we live today against a foreign attack in order to save American lives and defend American property.

The Constitution has not fundamentally changed in that regard. Article 2 of the Constitution provides “The President shall be commander in chief of the Army and Navy of the United States. . . .”¹¹ That executive power remains essentially the same today as it was 1814 when the defense of the capital occurred. As I thought it through, I turned to the US Army’s *Domestic Operational Law Handbook* where I read about the Military Purpose Doctrine.¹² The Military Purpose Doctrine states that the Posse Comitatus Act does not apply to those missions which are being executed primarily for a military purpose. The use of force for purposes other than arrest, search

and seizure is not proscribed by posse comitatus. When those Marines were deployed in Bladensburg in 1814 they weren't there to arrest anybody and when we established quick reaction forces in the wake of September 11th the purpose was not law enforcement but warfighting on our own soil as it had taken place during the War of 1812 and, some would argue, as Lincoln exercised that power during the Civil War. It was not that the power was not there; it was that we had not used it on our own soil for a military purpose in quite a long time. But I personally concluded that the Military Purpose Doctrine allows us to have Army units on alert—and we continue to have them on alert—prepared for ground deployment within the United States to defend, for instance, critical infrastructure, perhaps a nuclear power plant, against a transnational terrorist threat.

We do not anticipate, however, that the first several layers of our defense against a foreign attack on our own soil would be military in character. We emphasize that the primary dependence is upon civilian law enforcement. But if federal, state and local law enforcement authorities and ultimately the National Guard cannot physically defend American citizens against a foreign threat on our soil, under the Military Purpose Doctrine and consistent with the Posse Comitatus Act, we do have quick reaction forces ready to be deployed, not for purposes of law enforcement, but for purposes of warfighting under Article 2 of the Constitution in defense of the American people.

Responding to Natural Disasters

Having considered and addressed the use of military forces for defensive purposes, we then encountered the issue of the utilization of US military capabilities within US borders in the event of a natural disaster. Hurricane Katrina emphasized the challenges associated not with warfighting but the statutory authority related to incident management. Arguably the worst natural disaster in American history took place on August 29, 2005 when Hurricane Katrina came ashore along the Gulf Coast. Nearly two thousand lives were lost; the damage is measured in the billions of dollars. The performance of the US military in response to what were truly horrific circumstances was by most accounts superbly competent. That is not to say that the response to catastrophic events cannot be improved upon, but the simple fact is that the military response to Hurricane Katrina was arguably the largest, fastest deployment of military capabilities in US history. Between August 29 and September 10, the United States deployed seventy-two thousand military personnel—fifty thousand National Guardsmen, twenty-two thousand active duty—to the Gulf Coast to provide humanitarian relief. Out of that military response came, I believe, a significant respect for military capabilities, while simultaneously fairly

harsh criticism was being directed, often with justification, towards some civilian response authorities.

The discussion began immediately thereafter as to the appropriate role of the military in response to a catastrophic natural event. The Stafford Act¹³ and the Economy Act,¹⁴ as well as other provisions of statutory law, provide the Department of Defense authority to assist a lead civilian agency in responding to a natural disaster or a man-made event. The issue then becomes: if the military does well in such circumstances, why not put the military in charge? That, again, raises some of the issues that were first raised in Federalist 8. President Bush sparked serious and thoughtful discussion on that issue in a way that I think he consciously intended. We were able to think through both the opportunities and the challenges associated with the use of military capabilities in providing such a response. There was discussion in the media and at senior levels of government with regard to the possibility of designating the Department of Defense as the lead federal agency replacing, at least on a temporary basis, the Department of Homeland Security in providing a federal response to a disaster. Then the lawyers got into the act.

I have learned something from the Department of Justice with regard to the scope of the executive power under Article 2 of the Constitution and frankly it surprised me; it might not have surprised Hamilton and Madison but it surprised me. The Department of Justice in a series of opinions, the most fundamental of which goes back to 2002, concluded that when the Congress of the United States assigns a certain responsibility by statute to a particular cabinet-level department, the president lacks the authority thereafter to re-delegate that responsibility from the designated agency to another. That theory of law came into play in preliminary analyses of the issue of whether or not the authorities assigned to the Department of Homeland Security under the Homeland Security Act of 2002¹⁵ could be re-delegated by the president to the Department of Defense. Some very thoughtful legal scholars, including some within the Department of Justice, concluded that the president could not do that.

The Department of Homeland Security has been uniquely and specifically assigned the responsibility as the lead federal agency in responding to catastrophic events and in consequence management related to disasters. Whether or not it makes operational sense to reassign that responsibility, because Congress had spoken on the issue, in the absence of follow-on congressional reconsideration of the Homeland Security Act of 2002, it would appear, at least for the time being, that by law the lead federal agency in responding to natural disasters must remain the Department of Homeland Security.

As lawyers I ask you to consider what a profound impact the law and your profession had on a significant public policy debate. The outcome of that debate, at

least in the first phase, was conclusively determined by legal analysis. That doesn't close the door on a more robust military role, but it means that that military role will remain, at least under current law, subordinate to a lead federal agency which is civilian in character. Whether or not one would agree with him, I suspect Alexander Hamilton would feel pretty good about that result.

The position of the Office of General Counsel of the Department of Defense is that we do not need to amend the Posse Comitatus Act of 1878. The Defense Department has concluded the act does not impede in any significant way the military missions that the Department of Defense has been assigned to execute nor does the act present an unreasonable impediment to foreseeable military missions within the United States. Senator Warner and others have, from time to time, said as a matter of due diligence and prudence that a statute drafted in the Reconstruction era perhaps ought to be re-examined for its continued utility in the vastly different context of transnational terrorism of the twenty-first century.

I believe without question the terminology of the Posse Comitatus Act is out of date. We found ourselves, for instance, in the aftermath of Katrina dealing with civil disorder on the streets of New Orleans. If we were to experience a terrorist attack involving a weapon of mass destruction, it is entirely possible that the social chaos inevitably associated with such a catastrophic event would generate substantial civil disorder. In those circumstances, it might well be that the principles of the Posse Comitatus Act would come into play in terms of the use of Title 10 active-duty military personnel in providing immediate protection of constitutional rights and enforcement of federal statutes in circumstances where, for a limited period of time, civilian law enforcement authorities found themselves incapable of guaranteeing those constitutional rights or enforcing those federal statutes.

Counterterrorism

It is those circumstances that authorize the federalization of the National Guard and the use of the armed forces under the Insurrection Act of 1807.¹⁶ But when we examine transnational terrorism in the context of the Insurrection Act, we are not really dealing with an insurrection as that act defines it. At a minimum, we need to re-examine the archaic terminology of the Insurrection and the Posse Comitatus acts in order to ensure that their language remains consistent with the character of the threat that we face in the twenty-first century. The Defense Department's position has been that the Posse Comitatus Act does not need to be substantively amended, but that the terminology of both the Posse Comitatus and the Insurrection acts should be reconsidered in order to ensure the principles of law reflected in those statutes remain relevant to the twenty-first-century threat.

Can we use the National Guard for domestic counterterrorism missions in support of civilian law enforcement? I am not certain the law is clear on that point. That too must be examined, probably by legislative authorities. Congress about a year ago amended the law to provide that a joint task force (JTF) engaged in counter-narcotic activities, typically along the borders of the United States, could engage in counterterrorism activities domestically in support of civilian law enforcement. It was a very brief amendment to the law. With virtually no legislative history, we are still trying to figure out the legislative intent reflected in that statutory change, but the law now provides that Title 10 active-duty military forces, like JTF North in El Paso, Texas, may engage in counterterrorism activity in support of civilian law enforcement authorities. There is no analogous provision of law empowering the National Guard to engage in similar missions. As a result, we now have a disparity in the law in which Title 10 forces may take on such counterterrorism missions, but National Guard forces may not, even though they may be colocated.

In the absence of other specific legislation, we find ourselves straining, under pre-existing authorities not particularly well suited to counterterrorism missions, to shoehorn what are at least in appearance and perhaps in substance counterterrorism activities into other statutory authority. What I suggest needs to be undertaken, in a sober, serious and deliberative manner, is an effort to better define the counterterrorism mission assigned to Title 10 joint task forces and the parallel authority, if any, granted to the National Guard to also engage in counterterrorism activities in support of civilian law enforcement.

Intelligence Support

Another issue that I'm going to be unable to resolve in my remarks, but want to pose for your consideration, is intelligence support for domestic uses of the armed forces. When military forces are used within our own borders for certain warfighting, counterterrorism and force protection missions, there is a requirement for intelligence, as is the case for all military missions. I suspect when those Marines defended against those unnamed invading forces at Bladensburg in 1814 they had military intelligence requirements, such as: Where are the enemy forces? By what means are they moving towards our positions? How many are there and how are they equipped? In short, the information needed to better anticipate and respond to the enemy attack.

That requirement is as necessary today as it was then. As we look at the domestic warfighting responsibilities of both the Title 10 military forces and, under the recent statutory amendment to Title 32, the National Guard, the question arises,

how, consistent with the civilian character of our government and the preservation of domestic civil liberties, do we acquire the intelligence information necessary to support our domestic military missions? There is no easy answer to that question and determining the answer will require sober judgment. We in the military see ourselves as consumers, not collectors, of domestic intelligence. I believe the law sees us as consumers as well. There are provisions of the law, very tightly constrained, that do allow certain military units, such as counterterrorism units, military intelligence units and general utility forces, to collect intelligence domestically. But, for reasons that are obvious and fundamental to the character of our nation, the role of the military in collecting domestic intelligence is very tightly and, in my judgment, appropriately constrained.

The military has statutory authority to collect domestic intelligence that relates to anti-terrorism force protection. Our terrorist adversaries do see, as indicated earlier, the United States as a part of the global battlespace. In the context of the past precedent of the September 11 attacks and a continuing threat of domestic attack, anti-terrorism force protection requirements for the military have been heightened as a military mission as a matter of immediacy.

The question to be considered is, given the force protection mission of conducting an active defense against the transnational terrorist threat within our borders and given the parameters of existing statutory authority that allow us to collect intelligence domestically for such a purpose, how do we bring to that framework an appropriate degree of clarity and detail that both enables the successful intelligence support of those military missions, while avoiding an intrusive and improper engagement in domestic intelligence collection activities by military forces? It is part of the balance that I addressed earlier. It is a balance that is subject to continuing assessment because of the nature of the threat that we now face domestically and the role of the military in defending against that threat.

Employment of Non-lethal Weapons

In response to Hurricane Katrina we deployed for either active or contingent military missions about fifteen thousand security personnel. Most of those military personnel were deployed to the New Orleans area. You may recall that about four or five days after Katrina came ashore, the president deployed twenty-two thousand Title 10 military forces on a humanitarian mission. They were there in conformity with the Posse Comitatus Act and also available for service in anticipation of invocation of the Insurrection Act if civil disorder had continued within New Orleans. The soldiers from the Army's 82nd Airborne and 1st Cavalry divisions and Marines from the 1st and 2nd Marine divisions deployed to New Orleans for a

humanitarian mission. But they also established a military presence and were available, subject to presidential authority, for security missions if the president had chosen to invoke the Insurrection Act. In addition, we used seven thousand National Guard forces, which were not subject to the Posse Comitatus Act, in direct law enforcement roles, including over four thousand National Guard military police who actively and lawfully engaged in law enforcement-related activities.

Fifteen thousand men and women in uniform were deployed in the aftermath of Hurricane Katrina into an area of civil disorder, either directly engaged in security missions or potentially engaged in such missions. They were neither trained in the use of nor equipped with non-lethal weapons. In my judgment that was a mistake and we need to learn from that experience. Imagine, if you will, a need to respond to a larger catastrophic event, perhaps a terrorist attack involving weapons of mass destruction, where loss of life and physical devastation might be far worse than what we experienced during the very difficult and tragic days of Hurricane Katrina. We could and should anticipate that, in the context of related civil disorder, the military may have a role to play and that role might include the use of lethal force.

But, again in my judgment, we should not limit the range of options available to our military commanders. Commanders on the ground should have the flexibility to restore civil order, protect constitutional rights and preserve federal statutory authority with a proportionate degree of force which, in their determinations, would be sufficient to fulfill mission requirements. The choice should not be passivity versus lethality. We have non-lethal weapons in our inventory that would be sufficient in many circumstances to maintain or restore civil order without necessarily threatening the actual loss of life.

Certainly the legal issues associated with that are profound. If we deploy soldiers on our own streets in a catastrophic circumstance reflecting a character of civil disorder and if we do execute such a deployment for the purpose of preserving constitutional rights, equal protection of the law for instance, and enforcing other statutory authorities, what legal authority should be provided? What liability provisions should be enacted in order to ensure the proper employment of such non-lethal capabilities?

I spoke earlier about critical infrastructure protection. If we use military forces to protect critical infrastructure such as nuclear power plants against potential al-Qaeda attacks, we have non-lethal capabilities those forces can employ that are very high tech in character. Some of those capabilities are quite well developed in terms of technology—microwave beams for instance—and can be used without risking the loss of life. Defending domestic critical infrastructure under the same circumstances with rifles and machine guns would pose obvious risks to the surrounding civilian community. But what are the public policy issues related

to use of non-lethal weapon systems? What are the legal issues? What liability questions are created? What if we were to use interlocking microwave beams to defend a nuclear power plant as a humane alternative to the use of deadly force, such as M16s and .50 caliber machine guns?

Non-lethal weapon systems certainly have the potential to effectively defend critical infrastructure. Lives, including innocent lives in the surrounding communities, could be saved through the use of such systems. But it is almost inevitable that an innocent person would be struck by a microwave beam. It seems preferable to me to be struck by a beam as opposed to a bullet from an M16, but what are the liability issues? What are the public policy questions that need to be examined? As with so many of the questions involving the domestic use of military forces, integration of non-lethal weapons into use-of-force capabilities must be preceded by public debate and legislative deliberation. In that way we can develop a legal framework that properly supports the domestic use of non-lethal weapons as a humane alternative to lethal force.

Who's in Charge?

The Hurricane Katrina experience witnessed multiple layers of local, state and federal government authorities (civilian and military) involved in the response without clarity of intent and perhaps with some insensitivity to constitutional history. I therefore ask the rather straightforward question, “Who’s in charge?” I know there are individuals in this audience from Israel. In Israel the answer to “who’s in charge” in responding to a disaster is pretty clear—it’s the Israeli Defence Force (IDF). When disaster occurs, the on-scene IDF commander is in charge.

I spent some time with the Home Front Command in Israel and have some familiarity with the system of government in Israel. It is a system that is not fundamentally federal in character.

Looking back to the historic events of 1787, it is clear that our founders created a more complex web of authorities that is consciously embedded and carefully integrated into the US Constitution. Ours is a system of checks and balances, which sounds pretty good until you have to mount an effective response to a catastrophic event. The theory of our Constitution—the wonderful theory of our Constitution—is that we preserve liberty through competition. We decentralize power throughout the federal government. But by federal I also mean the federal character of our government, which includes not just the national government but the fifty state and thousands and thousands of local governments. We defuse power in order to have a system of checks and balances. We have a Constitution that created three equal branches of government so that no one branch of government would

become too powerful and we gave certain powers to the national government and reserved the remainder to the states.

We have provisions in the Constitution, including the Tenth Amendment, guaranteeing certain authorities to the states, and others from the states to local government. So we recognize—at least I recognize—that if we are to remain consistent with the Constitution, the issue is really not “who’s in charge.” Under our Constitution, we will never have absolute unity of command. Our founders in their wisdom didn’t want that. They dispersed power in a decentralized manner throughout the various levels and branches of government. So our challenge is not to achieve unity of command; our challenge is to achieve, in military terminology, unity of effort within that system of decentralized authority, those checks and balances created by our founders. That requires very close coordination and detailed, integrated planning among all levels of government and between civilian authorities and military forces.

H.L. Mencken once said that for every complex problem, there is a solution that is simple, neat and wrong. There is no simple solution consistent with a Constitution of checks and balances. It requires hard work, integrated planning, a common understanding of the threat environment and careful consideration of foreseeable missions in advance of a crisis so that in the context of checks and balances we nonetheless achieve a unity of effort.

Conclusion

Forgive me for going on at such length, but I wanted to give you some sense of both the complexity of the issues and the seriousness and purpose that have been brought to those issues since September 11, 2001. We know that the US military has a tremendous ability to provide for the physical security of the American people, including the contingent missions related to domestic warfighting against foreign adversaries on our own soil if civilian law enforcement authorities are not capable of meeting the perceived or very real threat. And, as was obvious in Hurricane Katrina, we in the Department of Defense have a very important role to play in providing consequence management capabilities to augment and reinforce civilian authorities. But in the overall context of enhanced core missions evolving for the military domestically in the twenty-first century, we have not forgotten the cautionary words of Federalist 8. The achievement of security while maintaining our liberty remains our fundamental commitment and our core responsibility.

Notes

1. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST* (Terence Ball ed., Cambridge University Press 2003) (1788).
2. BERNARD SCHWARTZ, *A BOOK OF LEGAL LISTS: THE BEST AND THE WORST IN AMERICAN LAW* (1997).
3. Alexander Hamilton, *The Consequences of Hostilities Between the States*, Federalist Paper No. 8, NEW YORK PACKET, Nov. 20, 1787, reprinted in HAMILTON ET AL., *supra* note 1, at 31, available at <http://www.conservativetruth.org/library/fed08.html> [hereinafter Federalist Paper No. 8].
4. See Department of Defense, Strategy for Homeland Defense and Civil Support 7 (2005), available at <http://www.defenselink.mil/news/Jun2005/d20050630homeland.pdf>.
5. Federalist Paper No. 8, *supra* note 3, at 33.
6. *Id.*
7. *Id.*
8. *Id.* at 33–34.
9. Act of June 18, 1878, ch. 263, 20 Stat. 145.
10. Use of the Army and Air Force as posse comitatus, 18 US Code sec. 1385 (2000), available at http://www2.law.cornell.edu/uscode/uscode18/usc_sec_18_00001385----000-.html.
11. US CONSTITUTION, art. II, sec 2.
12. Now set forth in the Center for Law and Military Operations, Domestic Operational Law (DOPLAW) Handbook for Judge Advocates 24–25 (2005).
13. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 US Code sec. 5121–5206 (2000), available at <http://www.disastersrus.org/FEMA/Stafact.htm>.
14. Economy Act, 31 US Code sec. 1535 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+31USC1535.
15. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in various sections of 5, 6, 18, 44, and 49 US Code), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ296.107.pdf.
16. Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 US Code sec. 331–335 (2000)), available at http://www4.law.cornell.edu/uscode/html/uscode10/usc_sup_01_10_10_A_20_I_30_15.html.

PART II

**COMMAND OF THE COMMONS—
THE US PERSPECTIVE**

II

Command of the Commons Boasts: An Invitation to Lawfare?

Craig H. Allen*

Roll on thou deep and dark blue ocean—roll!
Ten thousand fleets sweep over thee in vain
Man marks the earth with ruin—his control
Stops with the shore

Lord Byron, *Childe Harolde's Pilgrimage*¹

Introduction

Lord Byron's humble respect for the sea contrasts sharply with the commonly held view of the tenth-century Danish King Canute. Canute is often (mistakenly) said to have believed that he could hold back the incoming tide by dint of royal will.² To silence a group of courtiers prone to excessive flattery, the king is said to have agreed to place his throne at the low tide line on the shore in Bosham, to demonstrate the absurdity of their suggestion that he could "command the obedience of the sea." Royal will failed to keep his majesty dry as the tide rose. "Just-so," as Kipling would say.³ What might we learn from the King Canute fable? We might start by expressing our envy for the ancient king, who at least had the good

* Judson Falknor Professor of Law, University of Washington, Seattle, Washington. Charles H. Stockton Professor of International Law, US Naval War College (2006–07). The views expressed are the author's and are not to be construed as reflecting the official views of the US Navy or any other branch of the U.S. Government.

fortune to face a “predictable” threat environment. Even in the tenth century, the daily tidal cycle was probably well known. The challenge facing the king in his “intelligence preparation of the environment” was therefore minor. The same cannot be said for the threat environment we face in the twenty-first century, which is everywhere described as one characterized by its uncertainty and accelerating pace of change. As one astute observer of our current situation might put it: if you do not expect to be surprised—even shocked—by what happens next, you are not paying attention.⁴ Second, one must admire the king’s practical modesty. He could have accepted the flattery, but he knew he could not “command” that great commons known as the sea.

The first panel in this, the 2006 Naval War College, International Law Department conference on “Global Legal Challenges: Command of the Commons, Strategic Communications, and Natural Disasters,” has been asked to offer a US perspective on current assertions regarding the US command of the commons. It is my privilege to moderate the discussion by a distinguished panel that includes Vice Admiral Lowell E. (“Jake”) Jacoby, US Navy (retired), the immediate past director of the Defense Intelligence Agency; Vice Admiral John G. Morgan, Jr., US Navy, deputy chief of naval operations for plans and strategy (N3/N5); and Rear Admiral Joseph L. Nimmich, US Coast Guard, assistant commandant of the Coast Guard for policy and planning.

It is noteworthy that this conference takes place at a time when the intelligence community has reliable indications that the Democratic People’s Republic of Korea (DPRK) has fueled one or more *Taep’o-dong 2* missiles, in apparent preparation for a test launch of the DPRK’s new intermediate-range weapon. In response, the US missile defense system has been activated and two Aegis-equipped cruisers are stationed off the Korean peninsula. How did we obtain our information on missile preparation going on within one of the world’s most closed societies? Why are US warships deployed to the far western Pacific to erect a missile defense thousands of miles from the US mainland? What does the story unfolding on the Korean peninsula tell us about claims to a “command of the commons”?

As the sole lawyer on the panel, the task fell to me to identify the most salient legal issues raised by claims to command of the commons. But I was also invited to weigh in on the involved factual and policy questions. My goals in this short article are modest. After setting out a lawyer’s response to claims of command over the commons, I turn to a brief legal analysis of the problems raised by this so-called hegemonic approach. The first and most obvious problem is that any assertion of command over the commons collides head-on with the relevant international law. The second problem—and the one strategy drafters would do well to bear in mind—is that such assertions could invite a response from lawfare practitioners, a

move that could jeopardize the freedom of access and maritime mobility on which our national security depends.⁵

I. The Panel's Precepts

The organizers of this year's conference might well have been moved to include a command of the commons topic after seeing a banner to that effect displayed in the Pentagon.⁶ The text of that banner is reproduced in the appendix to this article. Our panel is asked to focus on the perspective of the United States to command of the commons. We were provided a list of questions in advance. We are first asked, "How broadly should the global commons be conceived (space, air, surface, subsurface, seabed, cyber)?" Next, we are asked, "What are the primary threats emanating from the global commons?" Our third issue is "What role should elements of the Intelligence Community play? How should they be integrated into a plan for 'command of the commons'?" Finally, we are told that "The CNO and the *National Plan to Achieve Maritime Domain Awareness* call for a 'persistent' Intelligence, Surveillance and Reconnaissance (ISR) capability in the global maritime commons," and then asked to consider "What obstacles will we face in achieving that? Are any of those obstacles legal ones?"

In its reference to "the commons," the Pentagon banner lists the sea (including undersea), air, space and cyberspace. As our discussion unfolds, the three panelists appear to adopt a somewhat broader definition of the spatial dimensions of the commons, which includes the airspace, waters and seabed and its subsoil outside national jurisdiction, along with outer space and the electromagnetic spectrum.⁷ (Cyberspace was occasionally listed separately, though without distinguishing the privately or publicly owned cyberspace components that fall outside the commons.⁸) It takes but little imagination to appreciate the wide-ranging utility and pervasive usage of the commons. Some serve as a buffer (particularly for insular nations, like the United States), a highway of transit and transport, a place to lay cables and pipelines or to orbit satellites, and—infrequently for the last six decades—a battlespace.⁹ Outside of naval planning circles, it is also recognized that the commons are an important source of protein, a recreational arena, a key regulator of our planetary carbon cycle and climate, and, not nearly often enough, a place of scientific discovery. The importance of the commons in an era when the globalization "mega-trend" penetrates nearly every corner of the planet is undeniable.

In addition to questions about the spatial dimensions of the commons, it is necessary to address the more difficult temporal and conceptual dimensions of "command." By temporal, I mean whether the command referred to is meant to prevail in times of peace and war (to the extent that dichotomy any longer has meaning).

By conceptual, I mean the dimensions or degree attached to the claim of control. In the law of the sea context, the relationship between the State and a body of water is variously described in terms of “sovereignty,” “sovereign rights,” and “jurisdiction.”¹⁰ Assuming that “command” means something less than sovereignty over the sea (or any other common), what are its conceptual dimensions? The goals of sea command or control are relatively easy to identify. They typically include the goal of ensuring freedom of access and movement for warships, auxiliaries and supporting merchant vessels. Such access is essential to a power projection strategy. The *National Defense Strategy* appears to stop here; calling only for a capability to “operate from” the global commons, not to control them.¹¹ At times, however, claims to access take the form of presence, persistent presence, seabasing and perhaps even “global fleet stations.” And at times sea command or control strategies include denying use of the sea to one’s adversaries, at least during periods of conflict.

In assessing the bounds of what might be included in a “command” of the commons, my first recourse was to a common dictionary. Were I to attempt to explain what I meant by command of the commons to a layperson, I should assume that person would apply the common definition (a point we lawyers often forget). In the dictionary I consulted, the most relevant definitions for “command” included “to have authoritative control over; to rule; to have at one’s disposal; to dominate by position.”¹² “Authoritative” control implies for me some legitimate basis for exercising such control. “Rule” carries unfortunate connotations for many. On the assumption that *usage* of the term in the actual national strategy documents or literature was also relevant, particularly in the present audience, I decided to conduct a cursory literature search. The resulting definitions for command of the sea (and its sister phrases) were all over the board. After reflecting on the US Navy’s “Sea Power 21” concept papers¹³ and the Australian Naval Strategy,¹⁴ I came to the conclusion that the most useful definition of “command” over a space—physical or virtual—would have to focus on the putative commander’s capability,¹⁵ capacity¹⁶ and intent. It also became clear to me that one could distinguish the *fact* of “command” from the grand strategy that might lead a country to pursue such a command.¹⁷

Although it might have been easy to declare that the command of the commons concept is too vague to serve as an organizing principle amenable to legal analysis, I chose instead to craft a working definition that focused mainly on the sea command and would capture what appeared to be the commonly held attributes of command constructs. For this article, I ultimately settled on a definition that includes the requisite capability and intent to ensure freedom of movement for one’s vessels (power projection) during times of peace and war; and, during times of

armed conflict, to deny such movement to one's enemies (sea denial); and to exert that measure of control over neutral or unidentified craft that the law of neutrality permits (sea control).¹⁸

II. Assessing the Claim to US Command of the Commons

The claims espoused in the Pentagon banner find support in the 2003 article "Command of the Commons: The Military Foundation of U.S. Hegemony," by MIT professor and Strategic Studies Program Director Barry Posen. Indeed, one suspects the banner authors had carefully studied Posen's works. Writing in *International Security*, Professor Posen described his concept of command of the commons as the capability to effectively deny use of the commons to any other nation and to prevail in any military contest for the commons.¹⁹ He then went on to argue that the United States already enjoys *de facto* command of the commons; by which he means the sea, deep seabed, space and international airspace, and that command of the commons has supported the hegemonic grand strategy pursued by the United States since the late 1990s.²⁰ In explaining his use of the term, Posen equated "command of the sea" with what the historian Paul Kennedy referred to as "naval mastery"—more than mere superiority, but certainly less than claims to "rule" over space.²¹ Posen admits that "command of the commons" does not mean that other States cannot use the commons in peacetime, nor does the concept gain-say that there will be contested areas—the littoral and riverine regions, continental urban centers and jungles (but none of those areas are within anyone's working definition of the commons anyway). The true commons, Posen asserts, are commanded, under his definition, by the United States. He then concludes with a warning that "U.S. command of the commons provides an impressive foundation for selective engagement. It is not adequate for a policy of primacy."²²

A. The Claim to De Facto Command of the Commons

Applying the chosen test of capability, capacity and intent to claims of command of the commons leaves me with considerable doubt regarding the accuracy of those claims. Vice Admiral Jacoby's warning only increased that doubt.²³ On the contrary, it seems to me that the claims to a command of the commons reflect a troubling combination of unjustified confidence regarding a very uncertain threat environment²⁴ and a tin ear regarding the effect such claims are likely to have upon much of the audience of greatest concern to us. I could add that assertions that the United States presently enjoys command of the commons failed to impress the conference attendees I overheard, who, like skeptical Missourians, insisted on proof. Indeed, the reaction by one attendee to the title of this panel went something

like: “We couldn’t ‘command’ the commons with a 600-ship navy. How could we be expected to do it with 280 ships, 200,000 fewer sailors, and an ever-shrinking merchant fleet?”²⁵ Another asked, “If we command the commons, why can’t we stem the flow of illegal migrants and narcotics into our country?”

A quick look at the numbers is not likely to instill confidence in the Missourians. The seas cover 71% of the planet. The Pacific Ocean alone covers 64 million square miles (admittedly, some of which falls within the national waters of coastal States). If all 12 US Navy aircraft carriers were available to patrol the Pacific, each would still be responsible for an area of more than 5 million square miles (if you assume six-month deployment rotations, you must double that number). Those who suggest that the focus should be on targets of potential interest, not surface area, would do well to consider the United Nations Conference on Trade and Development’s recent annual report on shipping, which puts the number of merchant vessels in the world at more than 600,000.²⁶ That would cut down the carrier workload to just 5,000 vessels each. Of course, that does not include the growing fleet of unmanned vehicles operating on, under and over the seas. As a final feasibility measure, I thought back to the 2004 Northern Command Homeland Defense Symposium, where it was emphasized that the United States plainly lacks a maritime surveillance system anything like the one the North American Aerospace Defense Command (NORAD) provides for the air domain. Although some progress has been made using Automatic Identification System (AIS) and Long Range Identification and Tracking (LRIT) systems, maritime domain awareness still has a long way to go.

The lawyers among us will be quick to point out that any assessment of our “capability” to command the commons must include an assessment of our legal authority to act. As the 2003 *So San* incident demonstrated,²⁷ military capability unaccompanied by an adequate prescriptive and enforcement regime will sometimes utterly fail to produce the desired end state. Spanish Marines proved to be powerless to achieve a goal where the law fell short. Our legal authorities and capabilities are plainly not adequate to even “secure” the commons, let alone “command” them sufficiently to protect us against maritime terrorism or weapons of mass destruction (WMD) transport. The fact that the common four-part “DIME” inventory of the instruments of national power (diplomatic, information, military and economic) omits our law enforcement capabilities and capacities may be partly to blame for this blind spot in most maritime strategy thinking.

Capability is also a function of vulnerability. *Ex ante* claims to command of international airspace must be reassessed in an age when even terrorist organizations have access to unmanned aerial vehicles (UAVs) and missiles—including missiles capable of taking one of Israel’s most modern warships out of action.²⁸

Similarly, any claim to a “command” of outer space must be tempered by the knowledge of the vulnerability of satellites to laser or missile attack, a high-altitude nuclear explosion, or jamming from the ground,²⁹ and to the growing ease of access our adversaries now have to commercial satellites such as Google Earth™ and Digital Globe®. The vulnerability of vital communication cables strung across the deep seabed and of critical military and commercial networks to “cyber-attack”³⁰ similarly renders doubtful any claim that the nation has attained “command” of either of those domains. On the contrary, we can only hope that a defense establishment that connects and leverages its now lighter and more dispersed forces through a networked information and communications grid has studied the “unrestricted warfare” battle plan and has not thrown out its semaphore flags.³¹ In response to those who might argue that such vulnerability represents only the potential to lose command of the commons, and does not diminish present command, I would be tempted to respond by asking how they distinguish “command” from the more temporally limited concept of “superiority.”

In short, my initial look at the numbers fails the Missouri “show me” test. Indeed, one might be moved to remonstrate that the only reason that a claim to “command” of the commons is plausible at present is because no one is out there contesting the commons. The interest has moved to the littorals, ports and land domains. Witness China’s so-called “String of Pearls” ambition, to ensure access to sea lines of communication connecting it to the Persian Gulf oil fields through a string of bases stretching from Gwadar, Pakistan to Hainan Island.³² In these domains—the favored battlespace of the fourth-generation warfare practitioners—the fates of the *USS Stark*, *USS Cole*, *USS Kearsarge* and *USS Ashland*,³³ and the *INS Hanit* belie any notion of command. Here, there be dragons, and their riders are reading Mao and Ho Chi Minh, the *Small Wars Manual*³⁴ and the *Sling and the Stone*.³⁵

B. Command of the Commons as a Hegemonic Grand Strategy Element

The Pentagon banner includes a citation to Rear Admiral Alfred Thayer Mahan, suggesting that the banner authors’ concept of command of the commons has its roots in a larger strategy. Why Mahan, and why that particular passage? Is the Department of Defense suggesting that a strategy calling for command of the commons will be found in the old “foundations of strategy” that were “laid upon a rock”? Did Mahan believe that the United States would “guarantee” other States “their freedom to navigate the sea, air or space,” as the banner claims? With the trepidation any lawyer should feel before wading into national defense strategy, I decided to see just what Mahan stood for.

I took as my point of departure the belief that grand strategy, including its foreign policy elements, can be a useful window into a nation's intent with regard to the commons.³⁶ What do the US strategy documents say about the nation's intent with respect to the commons? My brief study of the literature persuades me that the evolutionary path of maritime and naval strategy in the United States has not been linear (Justice Holmes made a similar remark with regard to the evolution of the common law³⁷). It demonstrates many of the characteristics of the dialectic, while occasionally producing what economic historians might call a logistic surge, what Thomas Kuhn described as a revolutionary paradigm shift,³⁸ or what evolutionary biologists refer to as punctuated equilibrium. Essentially all such constructs describe a cycle of peaceful interludes punctuated by dramatic revolutions. Futurist Alvin Toffler warned that the frequency of that cycle is rising sharply.³⁹ Peter Schwartz adds that surprise—by which he means discontinuities—should no longer be surprising.⁴⁰ Current indications suggest we might be on the verge of just such a shift in grand strategy, as the mass of antithetical evidence and sentiment grows. Justice Holmes, a battle-tested Civil War veteran, would likely agree.

Over the years, naval and maritime strategy documents and treatises have adopted a variety of terminology to refer to the ends and means that make up the grand strategy. The choices are informed by history, policy, capability and perhaps even a little bit of law. Navies (and merchant fleets) figure prominently. The Greek historian Herodotus makes it clear that the Athenian navy's defeat of the much larger Persian fleet at the Battle of Salamis (480 BC) was a decisive victory for the Greeks. Indeed, Athens' naval "superiority," obtained more by strategy and skill than by relative fleet size, was the city-State's signature strength for nearly eight decades (it was lost when Athens executed most of its naval leaders, leading to a defeat by Sparta).⁴¹ Moving forward from the Greek and Roman experiences to the modern era, we see several shifts in the ends and means elements in strategy documents. They raise questions regarding distinctions between "superiority" in a given domain and "control" or "command" of that domain, and between the concept of "naval" superiority (or strategy) and "maritime" superiority (or strategy), and whether these are ends or means, and whether they are merely notional or aspirational. And finally, is it only the primacists who seek to "control" the commons?

Any examination of "sea control" and the correlative opportunity for "power projection" begins with Captain (later Rear Admiral) Alfred Thayer Mahan and Rear Admiral Stephen Luce, first president of the US Naval War College. Mahan was a naval officer and Naval War College professor (and later president) who characterized the sea as a "wide common."⁴² The commons included potential battlespaces, where the naval combatants would mass and meet, and sea lines of

communication, through which both warships and merchant vessels traveled. His magisterial 1894 book, *The Influence of Sea Power Upon History*, reveals Mahan as a naval strategist who saw sea control as the paramount goal of naval strategy.⁴³ He rejected the coastal defense and commerce raiding strategy of the day and offered in its place a vision of naval warfare as a contest for command of the sea. In Mahan's view, sea control was essential for a belligerent to be assured of access to the sea and freedom of mobility, while denying such access or movement to the opponent.⁴⁴ Later asymmetric strategies did not so much challenge Mahan's assumptions; rather, they looked for ways to circumvent the adversary's control of the seas.

In his 1911 treatise *Some Principles of Maritime Strategy*, Sir Julian Corbett took a broader and slightly less aggressive approach, rejecting what he considered to be a "big-battle fixation" by writers who advocated the principle of concentration.⁴⁵ Corbett distinguished "naval strategy," which focuses on command of the sea, from "maritime strategy," which focuses on the interplay between naval and land forces. To Corbett, naval strategy was but a subset of the maritime strategy, the purpose of which was to accomplish the sovereign's broader goals. He admonished that command of the sea was not a proper goal in and of itself but rather a strength that could be employed to support the nation's overall military objective.⁴⁶ Corbett concluded (as does Vice Admiral Jacoby) that it is rarely possible to achieve full control of the sea. He argued that a belligerent must always attempt to either secure command of the sea or prevent its opponent from doing so.⁴⁷ Nevertheless, he concluded that the "most common situation in naval war is that neither side has the command; that the normal position is not a commanded sea, but an uncommanded sea."⁴⁸

In 1954, a very young Samuel Huntington penned an unsettling article announcing that, in his view, the Mahanian strategy based on the clash of great fleets massing against each other was obsolete.⁴⁹ Viewing the Soviet Union as a massive land-force power that posed little or no naval threat, Huntington concluded that the US Navy force structure should be reshaped to prepare it for littoral warfare and power projection ashore.⁵⁰ John Keegan, in his *Price of Admiralty*, carries the concept forward; or should I say upward and downward? Looking back to World War II, and demonstrating how technology can quickly reshape the meaning of command of the commons, he concludes that the US Navy's aircraft carriers were the "supreme instrument of command of the sea" in that war.⁵¹ But, then, turning to the present, he falls prey to the sin of presentism, asserting that "command of the sea in the future unquestionably lies beneath rather than on the surface." Keegan acknowledged, however—quite prophetically—that future naval battles will likely be fought close to land, where there is less maneuvering space.⁵²

Command of the sea reached its most recent apogee with the appointment of John Lehman to serve as President Reagan's secretary of the Navy. Secretary Lehman is, of course, known as the author of the 600-ship Navy and "the" maritime strategy. Writing in his autobiography, *Command of the Seas*, Lehman reports considerable pushback in response to his maritime superiority strategy by those who considered it too ambitious and too provocative.⁵³ Nevertheless, some give considerable credit to the aggressiveness of Lehman's strategy and force buildup for the eventual capitulation of the Soviet Union.

As the Reagan era came to a close and with it the Cold War, naval strategy took a decisive turn inland. Two capstone documents of the 1990s, *From the Sea* in 1992⁵⁴ and *Forward . . . From the Sea* in 1995,⁵⁵ demonstrated that the focus on command of the sea had given way to a need to establish "forward presence," and that Mahan's blue-water battles between major combatants would give way to green- and brown-water activities and "maritime security operations."⁵⁶ For some, it looked like coastal defense and blockades were back in style. As one analyst put it more than a decade ago: "*From the Sea* writes the epitaph to the command of the sea 'system' that has dominated naval strategic thought since the sixteenth century when, thanks to the growth of seaborne commerce and the development of warships capable of keeping the sea, 'true naval war' replaced 'cross-ravaging' as the main purpose of military power at sea."⁵⁷ The intervening years have mostly borne that out, as naval forces have been extensively engaged in maritime security operations in the littorals of the Greater Mideast and in "projecting" power from the sea into the former Yugoslavia, Afghanistan and Iraq.

As we reflect back on a history that includes Salamis, Trafalgar, Midway, the Barbary Pirates and *Cole*, and briefly consider the various naval and maritime strategies that have competed for adherents, the lesson may be that any notion of command of the commons is held hostage by the competition for the strategic vision. Professor Posen makes a strong case for his claim of US hegemony.⁵⁸ He traces the path to our current hegemonic posture to the late 1990s, while recognizing that the hegemonic character of the strategy got an injection of steroids with the 2002 *National Security Strategy*⁵⁹ (though only for contested areas or with respect to specific threats, not for the commons). But, as noted earlier, he concludes that the hegemonic status, while sufficient for an effective strategy of selective engagement, is not adequate to support a policy of primacy (elements of which are contained in the 2002 *National Security Strategy*).⁶⁰ In the dialectic of grand strategy, there are clear signs that US thinking is backing away from its flirtation with primacy. Whether it lands on Posen's selective engagement or some variant of offshore balancing or strategic restraint is an open question. Are the differences among the strategies important for the legal analysis that follows? Perhaps. To the extent that

both primacy and selective engagement rely on some level of hegemonic command of the commons, they both raise legal questions. There is also good reason to be concerned that a strategy that purports to command what others consider common is likely to be opposed; and the opposition might well draw on all of the instruments of national (and non-State) power, including lawfare to frustrate the hegemon's design.

1. *The National Security Strategy Capstone Documents*

Current US high-level strategic plans embrace some elements of primacy, along with cooperative security and selective engagement. The 2002 *National Security Strategy* called on the Department of Defense to ensure its current military dominance was not challenged.⁶¹ The 2006 *National Security Strategy* reiterates that “[w]e must maintain a military without peer.”⁶² The Clinton-era Department of Defense *Joint Vision 2020* established the goal of “full spectrum dominance,” which was carried into the 2004 *National Military Strategy*.⁶³ At the same time, however, both the 2006 *National Security Strategy* and the *National Defense Strategy* acknowledge that the United States lacks the capability to address global security alone.⁶⁴ Moreover, the *National Defense Strategy* expressly disclaims any intent to achieve “dominance” in all areas of military capability.⁶⁵ And far from a pretension of presently commanding the commons, it asserts that “[w]e will operate in and from the commons by overcoming challenges to our global maritime, air, space and cyberspace operations.”⁶⁶

Other national strategy documents embrace a cooperative, multilateral approach. The *National Strategy to Combat Weapons of Mass Destruction*⁶⁷ and the *National Strategy for Combating Terrorism*⁶⁸ both rely on cooperative, multilateral and interagency approaches. The *National Strategy to Combat Weapons of Mass Destruction* recognizes that “it is vital that we work closely with like-minded countries on all elements of our comprehensive proliferation strategy.”⁶⁹ Similarly, the *National Strategy for Combating Terrorism* calls for strengthened coalitions and partnerships, including partnerships with international organizations.⁷⁰ The Proliferation Security Initiative⁷¹ and the concept once referred to as the 1,000-ship navy⁷² similarly embrace the multilateral approach.

National Security Presidential Directive 41 on maritime security policy clearly emphasizes the need for cooperation—combined, joint and interagency—in the pursuit of security in the maritime domain.⁷³ In calling for a new *National Strategy for Maritime Security* (NSMS), the president described the “maritime domain” as “all areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, other navigable waterway, including all maritime-related activities, infrastructure, people, cargo, and vessels and other conveyances.”⁷⁴ The NSMS and its

eight supporting plans were promulgated in 2005.⁷⁵ Rear Admiral Joseph Nimmich and Dana Goward, writing in this volume, explain that the hallmarks of the national strategy for maritime security are its commitment to obtaining maritime domain awareness, sharing the intelligence, providing a common operating picture, and establishing and enabling a layered defense.⁷⁶ In the words of many, “information superiority” will give way in the coming months to “information sharing” (a concept that might not sit well with primacists). The president’s directive also makes it clear that the strategy will be carried out in a way that respects the rule of law and does not unnecessarily impede legitimate maritime commerce.

2. The Coming Maritime Strategy: Has Command of the Commons Given Way to “Awareness” of the Maritime Domain and the Emerging Global Maritime Partnership?

At the 2006 Current Strategy Forum held shortly before our conference, the Chief of Naval Operations, Admiral Mike Mullen, called for the development of a new maritime strategy to guide the Navy in the coming years.⁷⁷ The new strategy document will join three other capstone planning documents, including *Sea Power 21*,⁷⁸ the *Navy Strategic Plan*⁷⁹ and the CNO-CMC *Naval Operations Concept*,⁸⁰ along with the forthcoming revision to the *Naval Doctrine Publication on Naval Warfare* (NDP-1). The strategy is also likely to embrace what was once referred to as the 1,000-ship navy concept⁸¹ (now the Global Maritime Partnership) and the National Fleet Policy.⁸² And the strategy will be consistent with higher-level plans, including the *National Security Strategy* and the *National Strategy for Maritime Security*. At the time this article was prepared, it was not clear what path the new maritime strategy would take. Primacy, selective engagement,⁸³ cooperative security⁸⁴ and offshore balancing were all being examined in what has been known as a “competition of ideas” that seeks to cull the best from the “wisdom of groups.” Some have strongly advocated some version of offshore balancing,⁸⁵ while Posen and others appear to favor a return to Clinton-style selective engagement. The debate over grand strategy has clearly moved beyond naval planning circles to both the national and global stages.⁸⁶

It seems safe to say that global maritime security is now seen by most as a team sport, but one that involves States of disparate ability and willingness. The advent of regional maritime security initiatives and risk-specific approaches like the Proliferation Security Initiative may portend the new modalities that will replace command and control approaches. Whether the threat comes from regional armed conflicts or Malaccan pirates, this increasingly globalized world plainly benefits from a maritime security approach that protects the sea lines of communication for peaceful navigation, commerce and overflight. While those common rights are

protected by international law, it is sometimes said that covenants without the sword are but words.⁸⁷

III. Command of the Commons and the Law

Turning from an amateur's examination of the policy questions presented to our panel to the legal question, two issues present themselves. The first concerns the legality of any claim to control over the commons, particularly if control takes the form of sea denial or assertions regarding access or presence exceeding those protected by the law. The second is one well suited for the Naval War College audience and concerns the potential lawfare use of a maritime strategy that purports to command the commons.

A. Command of the Commons and the International Law of the Commons

Lord Bryon was not available to the young Dutch jurist, Hugo Grotius, who wrote his famous *Mare Liberum* (the sea is free) in 1608,⁸⁸ but Grotius would almost certainly have appreciated Byron's respect for the sea. Grotius' *Mare Liberum* was the opening salvo in the "battle of the books" with the Englishman John Selden. Selden opposed Grotius' freedom of the seas concept with his own *Mare Clausum* (the sea is closed) ten years later.⁸⁹ Grotius eventually won the battle for freedom of the seas. Even England eventually repudiated Selden's thesis. In one of Lord Stowell's most often-quoted decisions while on the English High Court of Admiralty, he explained that two principles of public international law are recognized as "fundamental":

One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate.

The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. . . .⁹⁰

Modernly, the sovereign equality of States is enshrined in the UN Charter, and the freedom of the seas—at least of the high seas—is codified in articles 87 and 88 of the 1982 Convention on the Law of the Sea (1982 LOS Convention).⁹¹

Military strategists are regarded by most international lawyers as contemptuous of the law and legal institutions. Clausewitz's canonical text for strategists refers to the "certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom."⁹² Foreign policy pundit George F. Kennan is remembered for his attack on what he saw as an excess of "legalism" (and moralism) in American foreign policy during the Wilson presidency years.⁹³ Although international and constitutional law scholar Philip Bobbitt has come to Wilson's (and FDR's) defense,⁹⁴ few from the strategy community have joined him. Unfortunately, too many international lawyers are unwilling to engage the security strategists directly. They therefore have the potential to create what Clausewitz would call "friction."⁹⁵

Most international lawyers would likely agree that, under the law, the phrase "command of the commons" is an oxymoron. It is in the very nature of a commons that no State has sovereignty over it. Indeed, such commons as the seabed beyond the limits of national jurisdiction are often referred to as the "common heritage of mankind."⁹⁶ That said, it must also be admitted that freedom within the commons in peacetime does not necessarily prevail when the drums beat the call to quarters. Accordingly, a distinction must be drawn in this analysis between laws applicable in peacetime and those that control in times of armed conflict. The former is largely set out in the UN Charter and 1982 LOS Convention. The latter is taken from a variety of sources including the conventional and customary law of armed conflict, the law of neutrality, specialized doctrines of blockade,⁹⁷ and the right of visit and search.⁹⁸ No exhaustive treatment of either is attempted here; however, command of the commons advocates must be alert to several key legal limits on their sea command, control and denial strategies.

The UN Charter rests on the principle of the sovereign equality of all States and prohibits the use of force—or the threat to use force—against the territorial integrity or political independence of another State.⁹⁹ Under the 1982 LOS Convention, neither the high seas nor the deep seabed beyond national jurisdiction are subject to any nation's sovereignty.¹⁰⁰ The same is true for international airspace. Over the years, the United States has jealously guarded high seas freedoms against coastal State encroachments,¹⁰¹ as the recent US reaction to Australian measures extending pilotage requirements to the Torres Strait demonstrates.¹⁰² The high seas and the deep seabed beyond national jurisdiction are also reserved for "peaceful purposes."¹⁰³ And what of those 600,000 merchant ships plying the oceans? While on the high seas, merchant vessels (and warships) come under the exclusive

jurisdiction and control of their respective flag States, thus limiting the extent to which a hegemon can exert denial or control strategies against them.¹⁰⁴

Under relevant laws applicable during armed conflicts, neutrals generally enjoy most of the same freedoms that prevail during peacetime, so long as they do not aid any of the belligerents or carry contraband on their behalf. That general statement is subject to two important qualifications, including the belligerents' right of visit and search,¹⁰⁵ and the somewhat unsettled regime of maritime "zones."¹⁰⁶ If, however, sea denial is reserved only for times of armed conflict, and is implemented in accordance with the international law governing the rights and obligations of neutrals, the law cannot be said to preclude "command" in the sense of the ability to deny uses of the sea in ways that conflict with those laws.

Although this brief comment will not focus on the outer space commons, it is worth mentioning that any claim to command of outer space is difficult to reconcile with the legal regime established by the Outer Space Treaty.¹⁰⁷ It is also interesting to note the stark contrast between the "command" notion and the provisions of the Treaty on Open Skies,¹⁰⁸ which permit overflight of even the *national* territory of each party, to provide potential adversaries a "confidence building measure." Primacists would do well to consider why a global hegemon with "command of the commons" would permit Russian military aircraft to overfly and photograph its naval and air bases. But the logic in such confidence-building measures as a means of *enhancing* national security is likely to elude most primacists.¹⁰⁹

In closing, it is important to acknowledge that our Janus-faced law both empowers and limits the United States. Boasts that the Navy has the capability to intimidate a hostile or potentially hostile coastal State or its government by parking a carrier battle group or expeditionary strike group 12 miles off the State's coastline carry with them a risk that the law is neither as clear nor as stable as the booster might hope.

B. Assertions of Command of the Commons as an Invitation to Lawfare

The foregoing analysis focused on the legal limits on attempts to exploit putative command of the commons to deny vessels or aircraft of another State access or transit rights protected by international law. This section is designed to alert the reader to the danger that an aggressive command of the commons posture may backfire and motivate other States to undertake measures to reduce the would-be commander's access or transit rights. It begins with the often heard assumption that when the stronger naval power controls the sea, the "correct" strategy for the weaker power is to attempt to *deny* its opponent use of the sea as much as possible.¹¹⁰ The concept of lawfare might provide one means to deny, or at least to limit, a hegemon's use of the sea.¹¹¹

The term “lawfare” was apparently coined in the 1970s, but initially lacked a coherent definition. Today the concept is most often associated with Air Force Major General Charles Dunlap, who defines lawfare as the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective.¹¹² It is noteworthy that lawfare tactics are included in the Chinese book on “Unrestricted Warfare.”¹¹³ The authors suggest an approach that applies international law asymmetrically: binding the more powerful nation, but not its less powerful opponent. The authors also recognize the important role of a sympathetic media to a lawfare strategy, as did Hezbollah during the 2006 conflict with Israel.

To be sure, the United States has never hesitated to use what has been described as lawfare to advance its national interests. Witness the new republic’s complaints that British boardings of US merchantmen to impress seamen for duty in the Royal Navy violated international law.¹¹⁴ Professor Davida Kellogg, among others, advocates a principled, proactive use of lawfare.¹¹⁵ But she warns that we must also be on guard against false or misleading versions of the law contained in the “pronouncements of nongovernmental organizations (NGOs), terrorist sympathizers and apologists, and uninformed reporters with political agendas.”¹¹⁶

Concern for lawfare tactics found its way into at least one high-level strategy document. The 2005 *National Defense Strategy* appears to expect that lawfare tactics will be used against the United States, warning in its section on “vulnerabilities” that “[o]ur strength as a nation will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism.”¹¹⁷ “Judicial processes and terrorism”? Putting tactless juxtapositions to one side,¹¹⁸ the secretary is probably right to be concerned. A few suggestions show why.

If I were giving advice to a client seeking to bind a would-be maritime hegemon through lawfare moves, several come to mind. First, I might advise the client to identify those States that most resent claims to command of the commons and seek their support within the United Nations General Assembly (UNGA) for, inter alia, a request that the International Court of Justice (ICJ) issue an advisory opinion condemning any attempt to “command of the commons” as a violation of the UN Charter, the 1982 Law of the Sea Convention and the 1967 Outer Space Convention, which collectively stand for the proposition of equal access for all States to those commons. Next I would suggest that the client work through the UN Informal Consultative Process on Ocean Affairs and the Law of the Sea to propose a General Assembly resolution defining “due regard for the exercise of the freedom of the high seas” and “peaceful use” under articles 87 and 88, respectively, of the Law of the Sea Convention in a way that renders illegal any claim to “command” of those seas or “sea control” by any nation’s warships.¹¹⁹ At the same time, the client might move for a resolution defining “innocent passage” to exclude any passage by

warships (or unmanned vehicles, which are nowhere mentioned in the convention) the flag State of which purports to command the seas in ways that conflict with the freedoms of other States, or to vessels en route to a “sea base” assignment (where the vessel will, in the minds of some, “threaten” the use of force, in violation of the UN Charter and the Law of the Sea Convention). Another tactic that is sure to attract the support of a number of coastal States would utilize the ICJ or UNGA to effectively reduce the commons, by legitimizing “security zones” of up to 200 nautical miles, within which no foreign warship, military aircraft (manned or unmanned) or intelligence gathering platform could operate without the consent of the coastal State, and only then when in full compliance with any applicable restrictions on vessel numbers, speed, weapons and means of propulsion, along with positive requirements to carry transponders and disclose to the coastal State any information gathered during the transit. A final tactic might be to build upon the suggestion of prominent publicists who argued in an earlier volume of the “Blue Book” series that naval warfare doctrines like blockade and neutrality are no longer viable in the post-UN Charter era,¹²⁰ and would thus provide no authority for interfering with shipping in a manner inconsistent with the 1982 LOS Convention.

Lest the reader think my goal here is to feed ideas to the nation’s enemies, let me assure you I have no such intent. My goal is to alert public and military officials to the risk that their assertions, whether in strategy documents or banner displays, can have serious unintended consequences. A message intended to raise the morale of service members or garner service support in congress might lead to legal pushback from opponents within and beyond the nation, in ways that create unwelcome and avoidable friction over access to the commons. The Navy war games strategies. Why not war game strategic communications? Why not ask your red team’s legal expert to game a response to any proposal for a “command of the commons” campaign?

Conclusion

De facto command of the commons will be seen by many as an unattainable goal in an age of asymmetric warfare against amorphous enemies who operate through dispersed cells. Those who confidently speak of having such command must be prepared to answer the practical questions regarding how the putative “command” would fare in response to an adversary’s war plan that calls for the targeting of all of the satellites and submarine cables on which the elaborately networked command depends in the first 96 hours. The command advocates must also address the economics of obtaining and maintaining command. The cost of restoring the Army and Marine Corps to their pre-Operation Enduring Freedom/Operation Iraqi

Freedom readiness levels will almost certainly make it impossible to build and maintain the resources effective command would require. It is unlikely that the world will soon realize the dream that we will beat our collective swords into plowshares. But the coming budget showdown in the United States does suggest that there is a growing risk that in the coming decade four Navy aircraft carriers might, in effect, be turned into armored Humvees for the Fleet Marine Force.¹²¹

Law is a vital enabler for liberal democracies and an important safeguard for our military forces. That law respects the sovereign equality of States and precludes any State from asserting dominion over the commons. Strategic statements that suggest a cavalier disregard for legally protected rights will almost certainly generate resentment and produce undesired effects. Those who might be tempted to post banners announcing “command of the commons” would also do well to reflect on what is to be learned from the “strategic communications” panel that follows in Part III of this volume. To make such a claim in peacetime, while the United States is simultaneously lobbying other States to join in a 1,000-ship navy to meet the urgent need for maritime security, disservices the national interest. And in an age when much of the world and virtually all of the media seem bent on discrediting the US defense establishment, claims to a “command of the commons” seem unnecessarily provocative.¹²²

Appendix

Command of the Commons*

Command of the Commons is the key military enabler of the United States.

The United States now enjoys command of the commons—command of the sea (including undersea), air, space and cyberspace. While other States can use the commons in peacetime, the United States guarantees their freedom to navigate the sea, air or space. Command of the commons is the key military enabler of the United States' global power position. It allows us to utilize other sources of power, including our own economic and military might, as well as the economic and military might of our allies.

How do we maintain command of the commons?

Maintaining command of the sea/undersea. Command of the sea allows us to project our national power and influence, and also enhances our country's economic prosperity. 99% of the volume—and 80% of the value—of the world's intercontinental trade moves by sea. The Air Force provides battle space management, precision navigation, weather services, close air support targeting and air refueling for both military and commercial users to solidify United States control over the sea.

From time to time the superstructure of tactics has to be altered or wholly torn down; but the old foundations of strategy so far remain, as though laid upon a rock.

Alfred Thayer Mahan

Maintaining command of the air. Unsurpassed by any nation, the United States Air Force maintains joint air and space dominance across the globe. Specialized attack, jamming and electronic intelligence aircraft combined with well-trained, professional airmen allows extensive control and exploitation of air, space and near-space domains. Given the superior capabilities the Air Force possesses, the United States is able to deter enemy threats and ensure forward operations providing an essential contribution to global security.

* Approximate text of a display in the Pentagon in 2006 (any formatting errors are mine alone).

Freedom from attack; freedom to attack.

Maintaining command of space. Maintaining command of space allows the United States to see across the entire globe in order to gather vast amounts of useful information. Over the last 50 years the United States has invested \$830 billion in space assets. Through capabilities developed and executed by the Air Force, the United States can track and identify military targets with fidelity and communicate this actionable information in a timely fashion.

See first—understand first—act first.

Maintaining command of cyberspace. The new strategic communication of the 21st century is cyberspace. Like its conceptual predecessor, cyberspace is an international domain of trade and intercontinental communication that connotes not only the Internet but an area of information and cognition that includes the channels of mass media and finance. Command of cyberspace can increase, sustain or diminish a nation's position of power in economic, diplomatic or military terms.

A new medium for communications, command and control.

Notes

1. George Gordon (Lord Byron), *Childe Harold's Pilgrimage* (1812–1818). The term “childe” was a medieval title for a young man who was a candidate for knighthood.

2. King Canute has been unfairly maligned for centuries. The “authoritative” version of the king’s apocryphal encounter with the sea makes it clear that the king never believed he could hold back the tides.

3. Rudyard Kipling, *The Crab that Played with the Sea*, in JUST SO STORIES (1902) (attributing tidal cycle to Pau Amma, the disaffected crab).

4. PETER SCHWARTZ, INEVITABLE SURPRISES: THINKING AHEAD IN TIME OF TURBULENCE (2003). Schwartz argues that we live in a time of “perpetual discontinuity,” a time in which “bombshells and shockers” are part of everyday life.

5. See generally Department of Defense, National Security and the Convention on the Law of the Sea (2d ed. 1996).

6. My thanks to the 2006 International Law Department Conference Chair, Rear Admiral and Stockton Professor Jane Dalton, for her notes on the text of the Pentagon banner. They are reproduced in the appendix. Any errors in recording are mine alone.

7. The National Defense Strategy limits its definition to “space, international waters and airspace, and cyberspace.” Department of Defense, National Defense Strategy of the United States 13 (Mar. 2005). Vice Admiral Jacoby argues for a broad definition of the global commons “if it is to be a useful construct in this era of globalization, rapid information age advancements, and the threats to terrorism and weapons of mass destruction.” Interestingly, he would add “un-governed areas,” like parts of Somalia where there is no effective government and may therefore serve as a haven for terrorists, as part of the global commons. Lowell Jacoby, *The Global Commons and the Role for Intelligence*, which is Chapter III in this volume, at 51.

8. The Department of Defense Dictionary defines “cyberspace” as “the notional environment in which digitized information is communicated over computer networks.” Chairman of the Joint Chiefs of Staff, Joint Publication 1-02, DoD Dictionary of Military and Associated Terms 138 (Apr. 2001, as amended through Aug. 2006) [hereinafter DoD Dictionary].

9. “Battlespace” is defined as “the environmental factors, and conditions which must be understood to successfully apply combat power, protect the force, or complete the mission. This includes the air, land, sea, space and the included enemy and friendly forces, facilities, weather, terrain, the electromagnetic spectrum, and information environment within the operational areas and areas of interest.” DoD Dictionary, *id.* at 64. The principal battlespace long ago shifted to the littorals and landward, where asymmetric warfare is the most effective. See the discussion below on naval and maritime strategies of the 1990s.

10. Lawyers fond of the bundle-of-sticks analogy explain that “sovereignty” denotes the full bundle of sticks, while usufructuary rights of innocent or transit passage represent far fewer “sticks.” A variety of legal labels have been attached to the seas and the interests of the States in those seas. One debate that concerned the deep seabed divided those who held the *res nullius* view from those who espoused the *res communis* approach. In his dissent in *United States v. California*, Justice Frankfurter concluded that the majority was confusing the concepts of *imperium* and *dominium*. He explained that the Roman law concept of *dominium* was concerned with property and ownership, while *imperium* related to political sovereignty. *United States v. California*, 332 U.S. 19 (1947) (Frankfurter, J. dissenting).

11. National Defense Strategy, *supra* note 7, at 13.

12. WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1988).

13. Vern Clark, *Sea Power 21: Projecting Decisive Joint Capabilities*, U.S. NAVAL INSTITUTE PROCEEDINGS, Oct. 2002, at 32.

14. ROYAL AUSTRALIAN NAVY, AUSTRALIAN MARITIME DOCTRINE – RAN DOCTRINE 1 – 2000 (2000), available at <http://www.navy.gov.au/spc/amd/amdintro.html> [hereinafter AUSTRALIAN MARITIME DOCTRINE].

15. The DoD Dictionary defines “capability” as “[t]he ability to execute a specified course of action. (A capability may or may not be accompanied by an intention.)” DoD Dictionary, *supra* note 8, at 76. The National Defense Strategy adopts a capabilities-based planning approach that links capabilities to joint operating concepts across a broad range of scenarios. National Defense Strategy, *supra* note 7, at 11. One writer defines military capability as “simply the ability to achieve a desired effect in a specific operating environment.” He also defines military capability as having three pillars: readiness, sustainability and force structure. Alan Hinge, *Preparedness*, excerpted at http://www.defence.gov.au/RAAF/organisation/info_on/operations/military_capability.htm.

16. If “capability” is understood to refer to the nature of the ability, “capacity” refers to the amount of that ability that can be delivered in a particular period of time.

17. An intent to command the commons does not necessarily imply a primacy strategy.

18. In its section on “command of the sea,” the Australian doctrine concludes:

A modern analyst [*] has noted that all these commentators were interested in war and they were concerned with dominance. They were acutely conscious of the historical advantages that lay with the utilisation of the sea to further national power. One of the first products of their thought was the concept of command of the sea, which was considered to be the principal objective of naval forces operating in a maritime campaign. This is defined as the possession of such a degree of superiority that one’s own operations are unchallenged by the adversary, while the latter is incapable of utilising the sea to any degree.

AUSTRALIAN MARITIME DOCTRINE, *supra* note 14, at 37.

*The “modern analyst” referred to is Rear Admiral J. Richard Hill (Royal Navy, ret.), author of MARITIME STRATEGY FOR MEDIUM POWERS (1986).

19. Barry R. Posen, *Command of the Commons: The Military Foundation of U.S. Hegemony*, 28 INTERNATIONAL SECURITY, Spring 2003, at 5–46. See also BARRY R. POSEN, INADVERTENT ESCALATION: CONVENTIONAL WAR AND NUCLEAR RISKS (1992).

20. Definitions of “hegemony” vary, and I was not able to find a clear definition of what constitutes a hegemonic grand strategy. One source describes hegemony as the dominance of one group over other groups, with or without the threat of force, to the extent that, for instance, the dominant party can dictate the terms of any intercourse to its advantage. It seems clear that the term has accumulated a distinctly sinister connotation over the past ten years.

21. PAUL M. KENNEDY, THE RISE AND FALL OF BRITISH NAVAL MASTERY (1976). Posen observed that Kennedy distinguished “naval mastery” from a temporary, local naval superiority. Posen, *supra* note 19, at 8.

22. Posen, *supra* note 19, at 44.

23. Vice Admiral Jacoby concluded that command of the commons was not a realistic goal, particularly given the limits on intelligence. As he put it, “If we attempt to know everything about everyone all the time, we will fail.” Jacoby, *supra* note 7, at 53.

24. The secretary of defense asserts that uncertainty is “the defining characteristic of today’s strategy threat environment.” National Defense Strategy, *supra* note 7, at 2. In assessing claims to command of the commons, the entire threat environment, including threats from irregular, catastrophic and disruptive threats, must be considered. *Id.* at 2–3.

25. Navy ranks have dropped below 350,000 (down 220,000 from its 1991 level). Active duty Marine Corps strength is about half that number. *See also* Summary of Remarks by Chief of Naval Operations, Admiral Mike Mullen, at West 2006, January 12, 2006, in Neal Thompson, *West 2006 Wrap Up*, U.S. NAVAL INSTITUTE PROCEEDINGS, Feb. 2006, at 42 (reporting that the Navy's current fleet strength of 281 ships is not enough to meet the service's growing responsibilities, which include maintaining readiness to fight on two fronts, combating terrorist activities, drug and weapons trafficking, and piracy at sea, along with rescue and recovery efforts in the wake of Hurricane Katrina and the 2004 Asian tsunami).

26. United Nations Conference on Trade and Development, *Review of Marine Transport, 2005*, Annex III, at 123, available at http://www.unctad.org/en/docs/rmt2005annexes_en.pdf. The precise count was 623,626. I admit that many of those are small craft, but how large must a vessel be to serve as a launching platform for a Man-Portable Air Defense System (MANPADS) missile or, for that matter, a cruise missile?

27. In late 2002, Spanish warships intercepted the freighter *So San* while on the high seas off the coast of Yemen. The vessel was suspected of transporting missiles to an unknown destination. A boarding team of Spanish Marines from the *Navarra*, later joined by US Navy personnel, conducted a non-compliant boarding of the *So San*, and during the subsequent search discovered North Korean-made Scud missiles and components hidden beneath the vessel's cargo of bagged cement. When it was determined that there was no basis to seize the vessel or her cargo, the vessel was released. *See* Nuclear Threat Initiative, *North Korea: U.S., Spanish Forces Seize Scud Shipment*, Dec. 11, 2002, available at http://www.nti.org/d_newswire/issues//2002/12/11/7p.html.

28. Norman Polmar, *Hezbollah Attack: Lessons for the LCS?*, U.S. NAVAL INSTITUTE PROCEEDINGS, Sept. 2006, at 88 (describing the July 21, 2006 attack on the Israel Navy Ship (INS) *Hanit* (a corvette) by a C-802 cruise missile).

29. *US Claims that China has Used Lasers to Attack Satellites*, JANE'S DEFENCE WEEKLY, Oct. 18, 2006, at 7. The article points out that a high-altitude nuclear explosion would wipe out US low-earth-orbit satellites.

30. *See generally* COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (Vol. 76, US Naval War College International Law Studies).

31. The US Armed Forces envision a global information grid (GIG) that stretches from the commander in chief to deployed units. An examination of its "teleport" schematic reveals the GIG's dependence on satellites. Chairman of the Joint Chiefs of Staff, Joint Publication 6-0, Joint Communications System, at II-1-24 (2006).

32. Lawrence Spinetta, *Cutting China's String of Pearls*, U.S. NAVAL INSTITUTE PROCEEDINGS, Oct. 2006, at 40-42.

33. The vessels, assigned to an expeditionary strike group carrying the 26th Marine Expeditionary Unit, were fired at with Katyusha rockets and mortars during a port call in the Jordanian Red Sea port of Aqaba on August 19, 2005. None of the ships were hit.

34. US MARINE CORPS, SMALL WARS MANUAL (1940) (declassified in 1972).

35. THOMAS X. HAMMES, *THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY* (2004). *See also* MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* (1991).

36. National security strategy is defined as "[t]he art and science of developing, applying, and coordinating the instruments of national power (diplomatic, economic, military and informational) to achieve objectives that contribute to national security. Also called 'national strategy' or 'grand strategy'." DoD Dictionary, *supra* note 8, at 362.

37. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic, but experience”).

38. See, e.g., THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

39. See, e.g., ALVIN TOFFLER, *FUTURE SHOCK* (1970).

40. SCHWARTZ, *supra* note 4.

41. Following a relatively minor defeat in the battle at Arginusae, in which Athens lost 12 ships, the Athenian civilian leaders executed all of their top naval commanders, destroying the morale of their navy. Shortly thereafter, the Spartan general-cum-naval commander Lysander defeated the Athenian navy at the battle of Aegospotami, destroying 168 Athenian ships. See generally DONALD KAGAN, *THE PELOPONNESIAN WAR* (2003).

42. ALFRED THAYER MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY 1660–1783*, at 25 (5th ed. 1894).

43. It is true that he also argued that navies exist for the protection of commerce, *id.* at 26, but the means of protection come back to sea power. At the same time, for Mahan, “[s]ea power in the broad sense . . . includes not only the military strength afloat that rules the sea or any part of it by force of arms, but also the peaceful commerce and shipping from which alone a military fleet naturally and healthfully springs, and on which it securely rests.” *Id.* at 28.

44. His vision was taken up and acted upon by a former assistant secretary of the Navy who ascended to the presidency in 1901, at the age of 43. Just how much Admiral Mahan’s thinking influenced Theodore Roosevelt’s decisions to send Admiral Dewey and his Great White Fleet of four battleship squadrons around the world (1907–1909) or to construct a canal across the Panamanian isthmus (1904–1914) is a matter of speculation.

45. JULIAN CORBETT, *SOME PRINCIPLES OF MARITIME STRATEGY*, pt. III, ch. I (1911).

46. Corbett explains in his chapter on command of the sea: “That this vital feature [command of the sea] of naval warfare should be consecrated as a maxim is well, but when it is caricatured into a doctrine, as it sometimes is, that you cannot move a battalion oversea until you have entirely overthrown your enemy’s fleet, it deserves gibbeting.” *Id.* at 101. The “gibbet” was a form of gallows, where executed criminals were hung for public display.

47. *Id.*, pt. III, ch. I.

48. *Id.* at 87.

49. Samuel P. Huntington, *National Policy and the Transoceanic Navy*, U.S. NAVAL INSTITUTE PROCEEDINGS, May 1954, at 483. Huntington pronounced that:

The fundamental element of a military service is its purpose or role in implementing national policy. The statement of this role may be called the strategic concept of the service. . . . If a military service does not possess such a concept, it becomes purposeless, it wallows about amid a variety of conflicting and confusing goals, and ultimately it suffers both physical and moral degradation.

A military service capable of meeting one threat to the national security loses its reason for existence when that threat weakens or disappears. If the service is to continue to exist, it must develop a new strategic concept related to some other security threat.

50. Huntington likely could not have been expected to foresee the Soviet’s rapid naval buildup after the embarrassing October 1962 Cuban missile encounter. See, e.g., Donald Chipman, *Admiral Gorshkov and the Soviet Navy*, AIR UNIVERSITY REVIEW (July/Aug. 1982), available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1982/jul-aug/chipman.html>; DAVID FAIRHALL, *RUSSIAN SEAPOWER: AN ACCOUNT OF ITS PRESENT STRENGTH AND STRATEGY* 18 (1971).

51. JOHN KEEGAN, *THE PRICE OF ADMIRALTY: THE EVOLUTION OF NAVAL WARFARE* 267 (1988). Apparently, Admiral Raymond Spruance, who commanded Carrier Task Force 16 at the

Battle of Midway, disagreed. He is reported to have said that “the submarine beat Japan.” See ALEXANDER P. DESEVERSKY, *VICTORY THROUGH AIR POWER* 70 (1943).

52. KEEGAN, *supra* note 51, at 272. Although the book was written in 1988, shortly after the Falklands-Malvinas conflict, he does not include the naval battles in that conflict within his analysis.

53. JOHN F. LEHMAN, JR. *COMMAND OF THE SEAS* 116–17, 120 (1988) (reporting that some commentators objected that claims to maritime “superiority” might be newly provocative to the Soviets).

54. US Navy Department, . . . *From the Sea: Preparing the Naval Service for the 21st Century* (1992), *reprinted*, with commentary, in *U.S. NAVAL STRATEGY IN THE 1990S: SELECTED DOCUMENTS* 87–100 (John B. Hattendorf ed., 2006) (Vol. 27, US Naval War College Newport Papers). Volume 27, Professor Hattendorf’s most recent Newport Paper, continues the work he began in volume 19. JOHN B. HATTENDORF, *THE EVOLUTION OF THE U.S. NAVY’S MARITIME STRATEGY, 1977–1986* (2004) (Vol. 19, US Naval War College Newport Papers). Peter M. Swartz of the Center for Naval Analyses has compiled a study titled “US Navy Capstone Strategies and Concepts (1970–2006).” The study is available on The John Hopkins University Applied Physics Laboratory website, <http://www.jhuapl.edu/maritimestrategy/historic/overview.htm> (last visited Feb. 13, 2006).

55. US Navy Department, *Forward . . . From the Sea* (1995), *reprinted*, with commentary, in *U.S. NAVAL STRATEGY IN THE 1990S*, *supra* note 54, at 149–158.

56. The Royal Australian Navy Doctrine explains:

Command of the sea was theoretically achievable through the complete destruction or neutralisation of the adversary’s forces, but it was a concept that, however historically valid, became increasingly unrealistic when naval forces were being faced by a range of asymmetric threats brought about by technological innovations such as the mine, the torpedo, the submarine and the aircraft. Furthermore, attempting to command the sea carried the risk of dissipating resources by a failure to recognise that the sea, unlike the land, was a dynamic medium and that the value of maritime operations was in relation to the use of the sea for movement and not for possession of the sea itself. Julian Corbett, in particular, recognised these dilemmas. He pointed out that all naval conflict was fundamentally about the control of communications. With this in mind, Corbett qualified the concept of command of the sea, a process which led in the 1970s to the development of the contemporary term sea control.

AUSTRALIAN MARITIME DOCTRINE, *supra* note 14, at 38.

57. Jan S. Breemer, *The End of Naval Strategy*, 22 *STRATEGIC REVIEW* 40 (1994). Not everyone agreed. In 1999, noted grand strategist Colin Gray’s *Modern Strategy* argued that Mahan was (mainly) right. COLIN S. GRAY, *MODERN STRATEGY* 217–227 (1999) (concluding that Admiral Mahan was “wiser than his critics”). After criticizing Paul Kennedy’s treatment of Mahan, Gray goes on to opine that Mahan might be the most under-rated theorist of modern strategy. *Id.* at 217.

58. Posen, *supra* note 19, distinguishes hegemony from primacy. See also STEPHEN WALT, *TAMING AMERICAN POWER: THE GLOBAL RESPONSE TO U.S. PRIMACY* (2006); Stephen M. Walt, *American Primacy: Its Prospects and Pitfalls*, 55 *NAVAL WAR COLLEGE REVIEW* 9 (2002); Stephen G. Brooks & William C. Wohlforth, *American Primacy*, 81 *FOREIGN AFFAIRS* 20 (2002).

59. *Infra* note 61.

60. He explains that “[p]erhaps the first problem that primacy will create for the U.S. command of the commons is greater difficulty in sustaining, improving, and expanding the global base structure that the United States presently enjoys.” Posen, *supra* note 19, at 45.

61. The White House, The National Security Strategy of the United States of America 29–30 (2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf>.

62. The White House, The National Security Strategy of the United States of America, Introduction (Mar. 2006), *available at* <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>. See also National Defense Strategy, *supra* note 7, at 5 (“We will have no global peer competitor and will remain unmatched in traditional military capability”).

63. Chairman of the Joint Chiefs of Staff, Joint Vision 2020, at 6 (June 2000) (defining full spectrum dominance as “the ability of US forces, operating unilaterally or in combination with multinational and interagency partners, to defeat any adversary and control any situation across the full range of military operations”). See also Chairman of the Joint Chiefs of Staff, National Military Strategy of the United States 23–26 (2004). Beginning in 2004, the Joint Vision document is incorporated into the National Military Strategy.

64. See 2006 National Security Strategy, *supra* note 62, Introduction (our strength “rests on strong alliances, friendships, and international institutions”); National Defense Strategy, *supra* note 7, at 5 (listing as a vulnerability: “[o]ur capacity to address global security challenges alone will be insufficient”); *id.* at 18 (“our security is inextricably linked to that of our partners”).

65. National Defense Strategy, *supra* note 7, at 12.

66. *Id.* at 13.

67. The White House, National Strategy to Combat Weapons of Mass Destruction (Sept. 2006) [hereinafter NS-CWMD], *available at* <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

68. The White House, National Strategy for Combating Terrorism (Dec. 2002; updated and reissued 2006) [hereinafter NS-CT], *available at* <http://www.whitehouse.gov/nsc/nsct/2006/nsct2006.pdf>.

69. NS-CWMD, *supra* note 67, at 6.

70. NS-CT, *supra* note 68, at 19.

71. Text and commentary available at <http://www.usinfo.state.gov/products/pubs/proliferation>.

72. An overview of the “1000-ship navy” concept is available at http://www.janes.com/defence/naval_forces/news/jfs060612_1_n.shtml.

73. The White House, National Security Presidential Directive 41/Homeland Security Presidential Security Directive 13, at 5–6 (Dec. 21, 2004) (NSPD-41/HSPD-13), *available at* <http://www.fas.org/irp/offdocs/nspd/nspd41.pdf>.

74. *Id.* at 2.

75. The White House, National Strategy for Maritime Security (2005), *available at* <http://www.whitehouse.gov/homeland/4844-nsms.pdf>. The supporting plans include the National Plan to Achieve Domain Awareness, Global Maritime Intelligence Integration Plan, Maritime Operational Threat Response Plan, International Outreach and Coordination Strategy, Maritime Infrastructure Recovery Plan, Maritime Transportation System Security Plan, Maritime Commerce Security Plan, and Domestic Outreach Plan.

76. Joseph L. Nimmich & Dana A. Goward, *Maritime Awareness: The Key to Maritime Security*, which is Chapter IV in this volume, at 61–64.

77. Remarks as delivered by Admiral Mike Mullen, Current Strategy Forum, Naval War College, Newport, Rhode Island, June 14, 2006, *available at* http://www.navy.mil/navydata/people/cno/Mullen/CNO_CSF140606.pdf. See also Brendan M. Greeley, Jr., *The CNO Calls for a New Maritime Strategy*, U.S. NAVAL INSTITUTE PROCEEDINGS, July 2006, at 6.

78. Clark, *supra* note 13, at 32.

79. Chief of Naval Operations, Navy Strategic Plan in Support of Program Objective Memorandum 08 (May 2006), *available at* http://www.jhuapl.edu/MaritimeRegistry/Documents/nsp_2006.pdf.

80. Chief of Naval Operations & Commandant of the Marine Corps, Naval Operations Concept 2006, *available at* <http://www.mcwl.quantico.usmc.mil/concepts/ServiceConcepts/NOC%20FINAL%2014%20Sep.pdf>.

81. *Supra* note 72.

82. The CNO has defined the 1,000-ship navy as a network of international navies, coast guards, maritime forces, port operators, commercial shippers and local law enforcement, all working together.

83. See William J. Clinton, A National Security Strategy of Engagement and Enlargement (Feb. 1995), *available at* <http://www.au.af.mil/au/awc/awcgate/nss-95.pdf> (“our engagement must be selective”). The 1995 National Security Strategy included provisions for forward deployments and power projection. Robert Art characterized the Clinton Strategy as one of selective engagement, a strategy Art advocates. ROBERT J. ART, A GRAND STRATEGY FOR AMERICA (2003).

84. There are clearly elements of cooperative security in both the 2006 National Security Strategy and the National Defense Strategy. See, e.g., National Defense Strategy, *supra* note 7, at 15.

85. Stephen Walt, *In the National Interest*, BOSTON REVIEW (Feb./Mar. 2005), *available at* <http://bostonreview.net/BR30.1/walt.html>.

86. See, e.g., WALTER RUSSELL MEAD, POWER, TERROR, PEACE, AND WAR: AMERICA’S GRAND STRATEGY IN A WORLD AT RISK (2004); CHRISTOPHER LAYNE, THE PEACE OF ILLUSIONS: AMERICAN GRAND STRATEGY FROM 1940 TO THE PRESENT (2006); COLIN DUECK, RELUCTANT CRUSADERS: POWER, CULTURE, AND CHANGE IN AMERICAN GRAND STRATEGY (2006); G. John Ikenberry & Anne-Marie Slaughter, *Forging a World of Liberty Under Law*, U.S. National Security In The 21st Century (Princeton University, Project on National Security), Sept. 26, 2006, *available at* <http://www.wps.princeton.edu/ppns/report/FinalReport.pdf>; Report of the UN Secretary-General’s High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (2004), *available at* <http://www.un.org/secureworld/>.

87. THOMAS HOBBS, THE LEVIATHAN, ch. 17 (1651) (“covenants, without the sword, are but words and of no strength to secure a man at all”).

88. HUGO GROTIUS, THE FREEDOM OF THE SEAS: OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE (James Brown Scott ed., Ralph van Deman Magoffin trans., 1916; reprinted 2001) (1608). Cynics might observe that the militarily weak Dutch had no choice but to argue for such protection under the law against the much more capable English and Spanish. See ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 10 (2003).

89. JOHN SELDEN, MARE CLAUSUM: OF THE DOMINION, OR, OWNERSHIP OF THE SEA (2004 reprint of the first edition by Lawbook Exchange Ltd.) (1635). Selden’s book was written in 1617 or 1618 but was not published until 1635.

90. Le Louis, 2 Dods. 210, 165 Eng. Rep. 1464 (High Court of Admiralty 1817).

91. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, reprinted in 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter 1982 LOS Convention].

92. CARL VON CLAUSEWITZ, ON WAR 75 (ed. and trans. by Michael Howard & Peter Paret, 1984) (1827). He would not, however, ignore *moral* values in war. *Id.* at 137.

93. GEORGE F. KENNAN, *AMERICAN DIPLOMACY, 1900–1950* (1951). George Kennan is best known as “X,” the author of *The Sources of Soviet Conduct*, 25 *FOREIGN AFFAIRS* 566 (1947).

94. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY* (2002). Bobbitt explains “What Wilson—and Roosevelt—understood quite clearly was the domestic wellspring of a sustainable foreign policy. They sought popular endorsement by playing the U.S. government’s strongest card, the American commitment to constitutional ideas as law.” *Id.* at 362.

95. Clausewitz laments that “[e]verything in war is simple, but the simplest thing is difficult.” CLAUSEWITZ, *supra* note 92, at 119. And the general’s battlefields did not include 24-hour news services, NGOs or congressional staffers.

96. 1982 LOS Convention, *supra* note 91, art. 136.

97. The most recent example was Israel’s so-called “blockade” of Lebanon in the 2006 cross-border conflict with Hezbollah. *See Israel Imposes Blockade on Lebanon*, REUTERS, July 13, 2006 (citing Israel military source who announced a “full naval closure on Lebanon, because Lebanon’s ports are used to transfer both terrorists and weapons to the terror organizations operating in Lebanon”).

98. The law of neutrality, which addresses the relationship between belligerents and neutrals, concerns questions of contraband, blockade and visit and search. The law of neutrality must be distinguished from the law of armed conflict, which governs actions between and among belligerents. *See generally* 10 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 644 (1968); 11 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* ch. XXXIII (1968); Hague Convention No. XII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 127 (Adam Roberts & Richard Guelff eds., 3d ed. 2000); 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 409 (Rudolph Bernhardt ed., 2000) (“Ships: Visit and Search”).

99. U.N. Charter art. 2, paras. 1, 4.

100. 1982 LOS Convention, *supra* note 91, arts. 89 (“No State may validly purport to subject any part of the high seas to its sovereignty”) and 137 (“No state shall claim or exercise sovereignty or sovereign rights over any part of the Area”). The “Area” is defined as the seabed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction. *Id.*, art. 1.

101. The second of the 14 Points President Wilson laid out in his address to Congress in 1918 was “[a]bsolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or part by international action for the enforcement of international covenants.” Woodrow Wilson, Address to Joint Session of Congress, Jan. 8, 1918, *available at* <http://www.lib.byu.edu/~rdh/wwi/1918/14points.html>.

102. *See* Report of the International Maritime Organization (IMO) Marine Environment Protection Committee (MEPC), 53rd Session, July 2005, *available at* http://www.uscg.mil/hq/gm/mso/docs/MEPC53_report_cable.doc.

103. 1982 LOS Convention, *supra* note 91, arts. 88, 141, 301.

104. *Id.*, art. 92.

105. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 31–32, paras. 118–121 (Louise Doswald-Beck ed., 1995). *See also* 11 WHITEMAN, *supra* note 98, at §§ 1–6; ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 7.6 (A.R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies); Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare, Pts. I & II*, 29 *CANADIAN YEARBOOK OF INTERNATIONAL LAW* 283 (1991) & 30 *CANADIAN YEARBOOK OF INTERNATIONAL LAW* 89 (1992).

106. See US NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES ch. 4 (2006) (law of naval warfare and zones).

107. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205. See, e.g., arts. I–IV.

108. Treaty on Open Skies, Mar. 24, 1992, S. Treaty Doc. No. 102-37 (1992), available at <http://www.state.gov/www/global/arms/treaties/openskil.html>. Russia flew two open skies flights over the United States (Alaska and the Southwest) in 2005 and planned four such flights for 2006.

109. Confidence-building measures are seen by many as the key to providing the transparency necessary for effective arms control. Such measures may be found in the International Atomic Energy Agency safeguards and in the Organization for the Prohibition of Chemical Weapons (OPCW) challenge inspections under Article IX of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 INTERNATIONAL LEGAL MATERIALS 800, reprinted in THE LAWS OF ARMED CONFLICT 239 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

110. Mine warfare is an often cited example of a sea-denial strategy.

111. Measures to erode political support for basing or support facilities have been identified as a key vulnerability for the US Navy's forward presence posture. Imagine a lawfare campaign that successfully pressured the Spanish and Italian governments to terminate agreements for US bases in Rota and Naples. See Owen R. Cote, Jr., *Assuring Access and Projecting Power: The Navy in the New Security Environment* (MIT Security Studies Program paper, April 2002), available at http://web.mit.edu/ssp/Publications/navy_report/navyreport.html.

112. Charles Dunlap, *Legal Issues in Coalition Warfare: A US Perspective*, 221, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 221 (Anthony M. Helm ed., 2007) (Vol. 82, US Naval War College International Law Studies). Lawfare was the subject of a Roundtable on National Security convened by the Council on Foreign Relations on March 18, 2003.

113. The book, written in 1999 by People's Liberation Army (PLA) Colonels Qiao Liang and Wang Xiangsui, lays out a strategy to defeat a technologically superior opponent, such as the United States. One translation of the book is available at <http://www.terrorism.com/documents/TRC-Analysis/unrestricted.pdf>.

114. See KAGAN, *supra* note 88, at 10. He explains:

George Washington, Alexander Hamilton, John Adams, and even Thomas Jefferson were not utopians. . . . They were realistic enough to know that they were weak, and both consciously and unconsciously they used the strategies of the weak to get their way in the world. . . . They appealed to international law as the best means of regulating the behavior of nations, knowing well they had few other means of constraining Britain and France. They knew from their reading of Vattel that in international law, 'strength or weakness . . . counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.'

115. Davida E. Kellogg, *International Law and Terrorism*, MILITARY REVIEW, Sept./Oct. 2005, at 50–57.

116. *Id.* at 50

117. National Defense Strategy, *supra* note 7, at 5.

118. The phrase and its implications did not escape the media's attention. See Op-Ed, *The Pentagon and 'Lawfare'*, WASHINGTON TIMES, Mar. 24, 2005, at A20.

119. Consider, for example, General Assembly Resolution 3314 (XXIX) (1974), in which the assembly adopted, without a vote, a definition of “aggression.” The assembly’s definition was later picked up by the International Court of Justice in the case brought against the United States by Nicaragua. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. Rep. 1, para. 195 (June 27) (merits) (holding that the description in paragraph 3(g) of the annexed definition “may be taken to reflect customary international law”). The tribunal found it unnecessary to cite evidence of State practice or *opinio juris* to support its conclusion.

120. A.V. Lowe, *The Commander’s Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in *THE LAW OF NAVAL OPERATIONS* 109, 130–38 (Horace B. Robertson, Jr. ed., 1999) (Vol. 64, US Naval War College International Law Studies); Mark W. Janis, *Neutrality*, in *supra* at 148.

121. Former Naval War College president and Carter-era director of Central Intelligence Admiral Stansfield Turner, is apparently ready to give up the carriers. Stansfield Turner, *Do We Need Carriers?* U.S. NAVAL INSTITUTE PROCEEDINGS, July 2006, at 16.

122. See National Defense Strategy, *supra* note 7, at 5 (“Our leading position in world affairs will continue to breed unease, a degree of resentment, and resistance”).

III

Global Commons and the Role for Intelligence

Lowell E. Jacoby*

Introduction

This article attempts to answer four questions concerning the global commons and the role for intelligence in the evolving circumstances in which transnational terrorism has replaced the military capabilities of a small set of potential adversarial States to become the primary threat to the United States and its interests. First, how broadly should the global commons be conceived (space, air, surface, subsurface, seabed, cyberspace)? Second, what are the primary threats emanating from the global commons? Third, what role should elements of the intelligence community play? How will they be integrated into a plan for command of the commons? Finally, the Chief of Naval Operations and the *National Strategy to Achieve Maritime Domain Awareness*¹ call for a persistent intelligence, surveillance, and reconnaissance (ISR) capability in the global maritime commons. What obstacles will we face in achieving that? Are any of those obstacles legal ones?

Domains of the Global Commons

In a more rule-driven time, one or more of the space, air, surface, subsurface, seabed and cyberspace domains might be excluded from the commons. Concepts such as sovereignty, control of airspace or the seas, nation-State identity and prerogatives,

* Vice Admiral, United States Navy (Ret.)

and territorial waters had great meaning. Much of the meaning of those concepts and many of the accompanying rules are obsolete.

What forces have changed this situation? Globalization, the information age, the threats of terrorism and weapons proliferation are some of the factors at work, along with associated concerns over narcotics trafficking, smuggling and movements of illegal aliens, just to name a few.

The threats have redefined the commons. We speak of “ungoverned spaces” such as Somalia, or portions of nation-States where the government does not have effective control, which is a relatively common occurrence in today’s world. These areas are part of the global commons. They become potential havens for terrorists, or the source of other threatening activities. In the past, when nation-States lost control of some of their territory it was typically of concern to that State and maybe to its neighbors. Today, these situations are of far broader concern because of their association with the global commons.

The information age has had a tremendous effect. Cyberspace is a difficult-to-define, but an absolutely essential element of the global commons with great potential for both good and evil. It’s a largely ungoverned space apparently devoid of strong international conventions, an extensive body of legal opinion and precedence, and effective enforcement mechanisms. The debate within the United States over domestic surveillance is a manifestation of the issues concerning cyberspace and its position as the nexus of the commons and threats in the information age.

The components of the global commons are interconnected, interdependent and mutually reinforcing, making the associated issues very complex. Consider the following illustrative example. The threat is terrorist use of weapons of mass destruction (WMD) and the coordination of the planned operations occur over the Internet using advanced commercial technologies combined with use of multiple obscure dialects by a security conscious group with haven in ungoverned space. The movement of associated personnel is through established smuggling routes, the transportation of components for the weapon is facilitated by a narcotics network and the final movement of WMD to the planned attack location takes advantage of containers embedded in legitimate maritime trade. When viewed in this context, both the scope of the problem, and the need to master the global commons situation, come into focus. This scenario also captures the difficulties attached to the intelligence problem—a problem of scale, scope, complexity and the challenges presented by a highly accomplished foe.

The Primary Threats

Two conditions must exist for a threat to exist. An entity must have both the capability and intent to do harm.

The primary concerns are terrorism and proliferation of weapons of mass destruction. The worst case situation is the one where the two interconnect and terrorist groups with broad reach possess WMD attack capabilities. In this situation, capabilities and intent combine to present a threat of major proportions.

The global commons may play a key role in this threat scenario. The challenge for intelligence is to present the information required by decision makers that will enable them to defeat this threat. It is an awesome challenge and responsibility.

It is important to realize that a broad range of challenges to stability, economic well-being, international commerce, health and welfare also originate or can be abetted by employing the commons. Again, the intelligence challenges are immense.

Finally, there's an additional capability that deserves great attention, and that is the capability to disrupt or destroy the ability to communicate and access the data that's the lifeblood of today's world and modern military capabilities. Major disruption or destruction of these capabilities could threaten the global economy.

The Role and Integration of the Intelligence Community

Command of the commons is not a realistic goal, if the global commons are broadly defined. The ability of the adversary to hide and disguise activities, the limited value of traditional techniques such as deterrence and dissuasion, the pace of globalization and information technology changes, the interconnected nature of the problems, combine to make the concept of command of the commons in the traditional sense of command of the sea unachievable.

I take this position based upon what I believe is a realistic appreciation of what intelligence can achieve. If we attempt to know everything about everything all the time, which is what command of the commons would entail, we will fail. The result will be that we know some things about some things all the time and we will have spread ourselves too thin to be effective in providing requisite knowledge to decision makers. Rather, the key is to focus our efforts and dominate those portions of the commons that are integral to our priority objectives.

The key is to be selective and to prioritize our needs. Rather than control of the commons, we should focus efforts on achieving domination of those portions of the commons that are important at a specific time and place. This is akin to what is typically done in counter-narcotics interdiction operations. Intelligence collection

and analysis, plus the operating forces, are focused on a specified area for a specified period of time. This focus is overlaid on a fundamental understanding of the problem and operating patterns which has been achieved over time.

Intelligence must be agile and responsive to changing circumstances and decision makers priorities in this expansive common space. That requires intelligence to simultaneously provide breadth and depth. Breadth provides the foundation for the effort. It allows intelligence professionals to know something about everything all the time. This breadth then enables the focused efforts needed to employ capabilities and to inform decision makers as priorities are established.

Intelligence needs to be an integral part of the plan. The plan must establish priorities. It is essential that intelligence planners work with operators and decision makers to ensure that the intelligence capabilities are resourced and that the expectations are realistic. The resultant intelligence plan needs to be an integral part of the overall plan. And, as unforeseen circumstances are encountered, the agility and responsiveness based upon intelligence breadth and depth will be tested. A key element is that intelligence capabilities need to be in place early. They cannot be created after the priorities change. By then it is too late.

Finally, intelligence capabilities must span from unclassified data that is available in the public domain to highly sensitive data collected by highly classified means. These capabilities must encompass the data and expertise that friends and allies can contribute to assist in solving these very difficult problems. The data must be presented using the most modern information management techniques available and must reside on protected networks that employ the most advanced tools and capabilities. And, since the output of the processes is knowledge, the data must be processed through the minds of highly talented, dedicated and trained men and women.

A Persistent ISR Capability

Persistent surveillance is the capability to linger on a specified problem for as long as it takes to fully understand the issue or solve the problem. The problem may be to track an individual ship. The problem may be to monitor activities in a specified port. The problem may be to understand the activities of a particular shipping company that is potentially involved in illicit activities. The problem may be to understand the intentions of a specific individual. The problem may come down to identifying and tracking a single container that is in intermodal international commerce. Obviously, these and other problems that are encountered are great in terms of magnitude and complexity. It really is the issue of finding, and then maintaining contact on that often-discussed needle in the haystack.

The solutions to the problems will come from a variety of sources ranging from satellites in space, to human intelligence collectors, to examination of legal documents and financial records, to whatever sources of information may contribute to solving the problem. Tracking that container, for example, requires a great deal of international cooperation. The goal is to identify and begin the tracking at the point of departure so it can be interdicted at the optimal point during its movement. Once the target enters that intermodal transportation system, the surveillance problem becomes very, very difficult.

There will be legal issues threaded throughout. I have great appreciation for the close partnership that must exist between intelligence professionals and legal counsel. That partnership must be in place throughout the intelligence process. It must begin with the development of the plan and continue throughout the operation. That partnership needs to part of the overall plan. It can't be attached at the end if it is to be effective.

Conclusion

The concept of global commons must be very broadly defined and encompass the domains of space, air, surface, subsurface, sea beds and cyberspace if it is to be a useful construct in this era of globalization, rapid information age advancements, and the threats of terrorism and proliferation of weapons of mass destruction. The domains of the global commons are interconnected, interdependent and mutually reinforcing.

The capabilities of the US intelligence community, and those of friends and allies, are integral to efforts to dominate the global commons. These intelligence capabilities must be simultaneously broad and deep. Intelligence required to successfully operate in the global commons will be derived through a broad variety of sources from unclassified data that is publicly available to highly sensitive data collected by highly classified means. The most modern information management techniques must be applied to the data and the data must reside on secure networks employing the most modern tools and capabilities.

Key to dominance in the global maritime commons will be an ability to provide persistent surveillance. Persistent surveillance in the global maritime commons will be achieved by fully integrating a broad variety of information sources into a coherent, agile capability that allows analysts to generate the knowledge needed to make informed decisions with respect to the global maritime commons.

The expanse and complexity of the global commons presents problems of scale, scope and a convenient operating space for highly accomplished, sophisticated and dedicated foes. Only by recognizing the broad expanse of the commons and

focusing our intelligence efforts on those portions that can yield the information necessary to counter the wide array of threats can we address the new and emerging security challenges of the twenty-first century.

Notes

1. Department of Homeland Security, National Strategy to Achieve Maritime Domain Awareness (Oct., 2005), *available at* http://www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf.

IV

Maritime Domain Awareness: The Key to Maritime Security

Joseph L. Nimmich and Dana A. Goward*

Maritime security is burdened by thousands of years of history and tradition.

We in the Coast Guard are reminded of this truism on a daily basis. One particularly poignant reminder came in October of 2002, a scant thirteen months after the 9/11 attacks. In the middle of a weekday afternoon, a fifty-foot long boat pulled up near the Rickenbacker Causeway in Miami, Florida and offloaded 220 illegal aliens directly into the heart of downtown. Naturally, a news helicopter was overhead and the event was almost instantly broadcast nationwide.¹ The US Coast Guard is supposed to play a leading role in preventing these kinds of incidents, and the commandant of the Coast Guard at the time, Admiral Thomas Collins, ended up briefing the secretary of transportation. After he was told of the incident, the secretary, in some disbelief, asked Admiral Collins, “How in the world did they get through?” The Admiral’s reply was “Sir, with all due respect, how did they get through what?”

This is an amusing story for those of us in the maritime community because we have long known and accepted the openness and vulnerabilities of our many port and coastal areas. It should be an instructive story for us as well, though, as it makes two important points. First, it dramatically reminds us of the vulnerability of these

* Rear Admiral Joseph L. Nimmich, US Coast Guard and Captain Dana A. Goward, US Coast Guard (Ret.). An earlier version of this article was published in the April 2007 issue of the *U.S. Naval Institute Proceedings* and is republished with permission.

crucial parts of our transportation and economic systems. Our ports are essential trans-shipment nodes that are responsible for 95 percent of our trade. Many are highly specialized; all have high concentrations of expensive, difficult to replace infrastructure. Most ports are in population centers—and all are economic engines. Yet security has often been seen as an expensive obstacle, rather than an essential contributor, to the long-term, uninterrupted free flow of commerce.

Second, the incident in Miami, and the Secretary of Transportation's reaction, tell us that we maritime professionals fall far short of the expectations of government leaders and the populations they represent. The great majority of our leaders and citizenry are landsmen with no maritime experience at all. They are familiar with air travel, as a large portion of the population has traveled at least once by airplane. They know from movies and television that aircraft, airports, and the skies are monitored by radar operators, and that aircraft off course or in trouble can be quickly identified and assisted. Their experience at airports tells them that the flow of air traffic is orderly, efficient, fairly secure and much the same from one place to the next. Because few have experience with maritime transportation, they unconsciously assume—and expect—that the kind of orderliness and security they see in aviation also exists at seaports and on the ocean. When they discover to the contrary, they are disappointed, and often wonder why it is that the maritime community has not entered the modern age.

A part of the answer is again that maritime security is burdened by thousands of years of history and tradition. Unlike aviation, which sprang to life as we know it today in less than a hundred years and which has a coherent, relatively complete architecture of policies and supporting systems, maritime practices have evolved over centuries. Maritime policies and supporting systems have likewise evolved and have developed ad hoc. Unlike aviation where transparency has been the hallmark of safety and has been improved even more for security purposes, the maritime domain has long been marked by a culture of secrecy that now works against both individual community members and society as a whole.

Policy and Systems Architectures

The world's aviation system has a clearly articulated policy architecture and is supported by a well-developed systems architecture designed to monitor compliance and aid enforcement of the rules regulating flight operations. Maritime transportation, while there are local exceptions around the globe, has generally evolved over the centuries into a hodgepodge of interconnecting, often disparate policies, supported by semi- or completely incompatible sensor and information systems.

In the United States, the maritime domain is made even more complex by highly fragmented, some might say near chaotic, governance. A National Academy of Sciences study determined there were at least eighteen federal agencies that have responsibility for regulating some aspect of US maritime transportation and that there is little to no formal method of coordinating their efforts.² Add to these federal agencies a variety of agencies and organizations from the individual states, coastal cities, specially commissioned port authorities, marine exchanges, private facility operators, etc., and you have a truly dizzying picture. It explains the old saying that, “if you have seen one port, you’ve just seen one port.” There are 361 commercial seaports in the United States and all have different combinations of geography, governance, sensors, operating rules, ownership, mix of activities and so on. It is not a situation that easily lends itself to improvements in safety, security, or the efficient flow of commerce.

While the attacks of September 11 were conducted through the aviation system, the pre-existing aviation systems and policy architectures allowed for an exceptionally rapid and coordinated response. Near real-time visibility of the airspace of the United States and effective means of communication throughout the aviation system meant that the threat could rapidly be contained. Over five thousand aircraft were safely landed in less than two hours. Afterward, those same policy and system architectures provided forensics and made it very easy to insert policy changes and systems modifications to prevent further attacks. While one can debate whether or not those changes were the correct ones, once decided upon, they were easily and effectively implemented as a part of overall, coherent policy and systems structures.

We do not have the same advantages in the maritime domain. There is no maritime equivalent of the National Airspace System Plan³ that details the various parts of the system and how they are to work together and ensure that each is appropriately considered in governance. Maritime system policies, developed by eighteen different federal agencies, have no uniting structure and, in aggregate, have huge gaps. As one example, over thirteen million recreational craft have virtually unfettered access to the nation’s commercial and military harbors. While the individual states require that these boats be registered, many have no or lax titling practices, making boat registration much easier to obtain legitimately or fraudulently. And, unlike motor vehicle registrations, vessel data is not easily exchangeable and accessible by enforcement officials. An enforcement officer in Florida, for example, has a very difficult time, if it can be done at all, verifying information for a vessel that appears to be registered in Michigan. Further, and most importantly, few boaters are currently required to know how to safely operate their vessel and understand maritime rules and regulations. Most states do not even require that a boat operator

carry personal identification. Imagine the impact on highway safety and law enforcement if drivers were not only untrained and unlicensed, but not even required to carry photo identification.

Compounding the lack of a complete and coherent maritime policy structure is a lack of systems to enforce those policies we do have. In 2003, four Cuban Coast Guard members decided they no longer wanted to work in Castro's Cuba. One night they drove their small patrol boat north until, at about three o'clock in the morning, they found the Hyatt Hotel marina in Key West, Florida. They walked around Key West for two hours until they located a patrolling police officer and surrendered.⁴ One can imagine them handing over their side arms and explaining that their AK-47s were still in the boat. Despite comprehensive laws that establish strict requirements for international maritime arrivals, our lack of adequate maritime surveillance results in an average of fourteen successful, illegal, malicious incursions into the United States each and every week. We can only hope that the damage is limited to landing illegal migrants, tons of narcotics, and the occasional well-armed Cuban Coast Guardsman.

A Culture of Secrecy

Another part of the burden of maritime history and tradition is a culture of secrecy. Dealers in commodities don't want competitors to know the sources and destinations of their cargos. Fishermen don't want others to fish their favorite spots. Ownership of commercial vessels is often concealed through a network of contracts and paper corporations. On the vast and largely ungoverned and unpoliced global commons that are the world's oceans, being difficult to find has been key to protection from pirates, the navies of hostile nations, and others that would do a vessel harm.

This tradition of secrecy, along with the nature of the sea and ships, has led to maritime transportation being the preferred vector for some of the world's most infamous and evil cargos. Slaves, contraband, narcotics, conventional weapons to start a new war, or a weapon of mass destruction to inflict terror, all these and more can be transported in greater quantities, and often with greater secrecy, by sea than by any other mode. Maritime commerce brings near limitless good to the world, but its culture of secrecy has allowed it to bring significant evil as well.

The international community has always struggled to maximize the good and minimize the evil brought by maritime transportation. We want to take advantage of the sea's bounty to feed our children but don't want to destroy the fishing grounds and starve our grandchildren. We want to ensure the free flow of commerce but don't want illegal substances and people smuggled ashore. We want freedom of navigation, but are concerned that a vessel carrying thousands of tons

of explosive cargo can sail mere miles off our coast, en route from one foreign port to another, with no obligation to report its position or course, or obey our directions. We are concerned that some day such a vessel will be transiting off one of our ports or a defense facility or a large city when it suddenly turns toward shore—and disaster will strike.

We understand that in an information age security lies not in secrecy, but in transparency. And we are becoming convinced that it is time to begin shedding the burden of thousands of years of maritime history and tradition.

So how shall this be done? Improving governance with a more coherent and systematic approach to maritime regimes (policies, rules, regulations, statutes) is certainly required. We must also ensure that sufficient patrol and enforcement assets are deployed to deter and respond to violations of those policies. First and foremost though, we must understand the maritime domain and what is going on within it, so that we can formulate good policy, effectively deploy assets and ensure the uninterrupted free flow of commerce.

Maritime Domain Awareness—See, Understand, Share

Our goal must be to achieve “[a]n effective understanding of anything in the maritime environment that can effect [*sic*] the safety, security, economy, or environment of the United States,” the definition of “maritime domain awareness” in the National Strategy for Maritime Security.⁵ Achieving awareness will require that maritime activities and actors become more transparent, that what is seen is properly understood, and that this visibility and understanding be shared as widely as possible among members of the maritime community.

See.

We must overcome the traditional culture of secrecy and make all activity and actors more transparent. Evil can dwell only in dark and hidden places. Transparency leads to self-correcting behavior by shining a light that exposes bad actors and reinforces the ethic of good ones. It levels the playing field by revealing the cheat and removing his advantage. It improves safety and commerce by better informing users of hazards, conditions and routes. And it helps us focus scarce enforcement resources in the most important areas.

Understand.

Watching the flow of maritime activities and actors is of little use unless what is being seen can be understood. Decision makers must be able to differentiate a normal and innocent scene from one containing anomalies that deserve further

investigation. When available, intelligence, analysis and pattern recognition must be integrated into a context of broad situational awareness to understand motives and intent. The goal is to deter and prevent all threats and all hazards. Without understanding, the best surveillance system in the world will only be able to document adverse events as they unfold.

Share.

If we are to be successful in our maritime safety, security, and stewardship efforts, we will need to harness the abilities, authorities, time and efforts of all stakeholders. “Unity of command” among various levels of our federal, state and local governments, agencies of foreign governments, industry partners, etc. is unachievable and undesirable. Rather, we must foster “unity of effort” in pursuit of our mutual goals and interests through proactive, aggressive information exchange. Sharing data, analysis, operating pictures and the like as broadly as possible (given appropriate security and permissions) will provide multiple benefits and help with at least two significant problems:

- We don’t know what we know. Information needed to make critical decisions often exists but is not available and correlated by those who might use it. Data that showed multiple men of foreign origin traveling with no luggage had purchased airline tickets shortly before flight time on four different airlines existed on the morning of September 11, 2001. Had this data been available and shared widely in an aviation safety and security community that understood the potential threat, the world today might be a far different place.

- The challenge of complexity. The pursuit of maritime safety, security and stewardship involves widely diverse players with far different sets of authorities, responsibilities and capabilities—and these players operate in unique and varied geographic and maritime locations. Shared awareness empowers each player and fosters unity of effort in dozens of ways, from better informing individual missions and avoiding “blue on blue” conflict, to drawing on the unconscious knowledge of local experts. Done properly, it enables each member of the maritime community to use shared data and knowledge to create a unique picture in support of its own needs and missions. This enables each to bring the full force of its unique authority, experience and expertise to the overall effort.

The Way Ahead

In the abstract, Maritime Domain Awareness (MDA) is a state of being, a goal that will never be completely obtained as we strive for ever greater understanding. More

concretely, it is something that mariners have been obtaining, to a degree, since the first dugout canoe was launched and people felt the pull of the current and the pressure of the wind.

As now envisioned, Maritime Domain Awareness is a process that collects, fuses, and analyzes data about activities in, and the conditions of, the maritime environment and then disseminates the data gathered and analysis results to decision makers. Put another way, it's the ability to gather the information to detect what it is that's the threat, fuse the information to truly know that it is a threat, analyze it so that the necessary corrective action can be determined, and then be able to move that information to a command and control mode (the decision maker) to order the necessary action to be taken. It is a process that will be heavily dependent on technology, some of which currently exists, some of which will require development. The "observables" on which information is collected include the characteristics of the vessel and its history, information on the passengers, crew and cargo, infrastructure, sea lanes, threats and weather. The collection portion of the process will involve a wide variety of sources: sensors, both short and long range; open source; private sector; law enforcement; intelligence agencies; and, of course, our international partners. Our surveillance capabilities must be persistent and pervasive. Some of the sensor technology to meet this requirement already exist, e.g., radars, cameras and space-based imaging systems; however, nearly all existing systems require upgrades. Other technologies, including high-altitude, long-endurance unmanned air vehicles; remotely piloted, unmanned surface and subsurface vessels; and aerostats and buoys equipped with a variety of sensors are possibilities for the future system.

The next step in the MDA process is to fuse and analyze data gathered. Unless that can be accomplished in a timeframe that permits effective action to be taken against identified threats, the utility of the data will be limited. Processing the massive quantities of data in a timely manner to create actionable information presents an enormous challenge. Advanced, automated data-fusion technologies will be critical to the task, and these do not exist today except as advanced research and development projects.

Because MDA can only be achieved through a partnership of many government agencies, the dissemination of information between agencies and other stakeholders is essential. Today the sharing of information among agencies is dependent on existing networks and communication processes. Unfortunately most of those systems were designed for intra-agency not inter-agency dissemination of information. These communication difficulties are further compounded when nonfederal organizations are considered. While progress has been made, much needs to be done to develop networked information sharing using Internet-based

technologies that will be the key to ensuring that the necessary information is presented to operational commanders and other decision makers in a manner that enables accurate, dynamic and confident decisions and responses to maritime threats.

While much remains to be done to create the MDA process of the future, our awareness of activities in the maritime domain is better today than at any point in history. Much of that progress has been made in the five years since 9/11. We now require major vessels in international trade to carry Automatic Identification System transmitters so that we can track their movements. US Customs and Border Protection's National Targeting Center has made huge progress in understanding the supply chain and tracking cargoes. The International Maritime Organization has agreed to a fundamental change in the world's view of information to which a coastal State is entitled concerning ships on international voyages. In 2008 coastal states will have the right under international convention to know about ships that are just passing by up to 1,000 nautical miles offshore.⁶ Yet our understanding of the sea and activities therein remains highly fragmented and contains huge gaps. To use an aviation metaphor from 9/11, in the maritime environment there are still a lot of un-reinforced cockpit doors. We have a duty to do better.

To do substantially better will require unity of effort across the entire maritime community. The National Plan to Achieve Maritime Domain Awareness,⁷ approved by the White House in October of 2005, envisioned such an effort and provided the first few tentative steps forward on what will be a continuing journey. In the two years since its approval, the interagency process has developed an MDA Concept of Operations that establishes both a maritime situational awareness enterprise and a national MDA governance structure. The new "Director, Global Maritime Situational Awareness" (GMSA) is an interagency position hosted by the Coast Guard. Along with the Director, Global Maritime Intelligence Integration (a pre-existing position within the Office of the Director of National Intelligence), the GMSA director will co-chair an inter-department MDA Stakeholder Board that has responsibility for identifying needs, advocating for solutions and ensuring coordination between departments and agencies.

Complementing the progress in governance has been the rapid development of MDA technology and data sharing projects that are blossoming almost faster than they can be harvested. One especially noteworthy effort is the MDA Data Sharing Community of Interest. Jointly sponsored by the Coast Guard and US Navy, with technical advice from the Defense Department Chief Information Officer's office, the project is demonstrating the ease of data sharing in a publish-and-subscribe, network-centric environment that can accommodate members as diverse as local harbor police and national intelligence analysts. Even more importantly, it is

proving once again that technology is the easy part of the equation compared to addressing political, process and people issues.

Conclusion

Maritime Domain Awareness is the key to Maritime Security. Our current awareness capabilities fall far short of where we could be—and should be—given available technologies and a reasonable willingness to work together. Our national security depends upon continued progress on a journey that has only begun. Moreover, the public expects we should already be far ahead of where we are. We should make best speed to meet, and then exceed, those expectations.

Notes

1. For a report of the incident as it was occurring, see CNN.com, Haitian Refugees Jump Ship and Walk to Shore, <http://transcripts.cnn.com/TRANSCRIPTS/0210/29/bn.02.html> (last visited, Feb. 28, 2007).

2. Transportation Research Board of the National Academy of Sciences, *The Marine Transportation System and the Federal Role: Measuring Performance, Targeting Improvement* 83 (2004).

3. The National Airspace System Plan was developed by the Federal Aviation Administration. First published in 1981, and updated several times since then, it is a comprehensive plan to modernize and improve air traffic control and airway facilities services.

4. See NBC6.net, Four Cuban Coast Guardsman Defect in Key West, Feb. 7, 2003, <http://www.nbc6.net/news/1963227/detail.html>.

5. The White House, National Strategy for Maritime Security 27 (Sept. 2005), *available at* <http://www.whitehouse.gov/homeland/4844-nsms.pdf>.

6. See International Maritime Organization, Maritime Safety Committee, Long Range Identification and Tracking, http://www.imo.org/Safety/mainframe.asp?topic_id=905 (last visited Mar. 8, 2007).

7. The White House, National Plan to Achieve Maritime Domain Awareness (Oct. 2005), *available at* <http://www.uscg.mil/hq/cg-5/docs/MDA%20Plan%20Oct05-3.pdf>.

PART III

COMMAND OF THE COMMONS—
THE INTERNATIONAL PERSPECTIVE

V

Threats from the Global Commons: Problems of Jurisdiction and Enforcement

Stuart Kaye*

Introduction

Oceans cover approximately 70 percent of the surface of the Earth. For international lawyers, this has long been an area which lay beyond the control of States. Prior to the advent of jurisdiction based on the continental shelf and the exclusive economic zone (EEZ), almost all of this area was beyond national jurisdiction. Only a tiny belt of sea of usually 3 to 4 nautical miles was subject to the direct control of a coastal State.¹ Even today under the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention),² where coastal States can extend their jurisdiction to the seabed and waters around their littoral out to 200 nautical miles, and the seabed in limited circumstances to as much as 350 nautical miles,³ two-thirds of the world's oceans are beyond any national jurisdiction.

This article considers the challenges facing coastal States attempting to combat threats to their security that pass through this vast area of high seas, in areas where the coastal State has no jurisdiction. It will consider the nature of the threats posed in these areas, and what tools international law provides States in order to respond to these threats. It will conclude by positing areas where further development may assist in improving the coastal State's ability to react in a timely and effective fashion to a threat in the global commons. However, before doing so, it is necessary to consider the limits of the global commons for the purposes of the paper.

* Dean of Law, University of Wollongong, Australia.

The Global Commons

There are a number of different definitions possible for the extent of the oceanic global commons. One would be to limit the commons to areas entirely beyond national jurisdiction and control. This would include the deep seabed, referred to in the 1982 LOS Convention as the Area, consisting of all of the seabed outside the continental shelf of any State, and the waters beyond the EEZ of any State.⁴ These are commons as jurisdiction is vested, in the case of the Area, in the International Seabed Authority as part of the common heritage of mankind,⁵ and in the case of the high seas, jurisdiction by States is limited to vessels flying their flag, except in very specific and limited circumstances.

Yet in a number of ways, restricting the global commons to these areas does not adequately indicate the freedom from State jurisdiction that is available even in the waters of the EEZ. The EEZ only gives a coastal State jurisdiction over economic activity, marine scientific research and environmental matters.⁶ It does not give a coastal State jurisdiction to interfere with freedom of navigation, the laying of submarine cables or pipelines, or to stop and board vessels unless they infringe coastal State laws concerned with the EEZ.⁷ This means that even if a foreign vessel had individuals onboard who had committed serious crimes against the coastal State, it would not be open for the coastal State to apply its law to that vessel. In some respects then, the EEZ remains an area of commons, even though the coastal State may still be able to regulate economic activities such as fishing and seabed mining. A similar situation is reflected for aerial navigation, as the airspace over the EEZ and high seas is international airspace, where there is a right of freedom of aerial navigation.⁸

In the context of this article, the global commons will be treated as areas where the activities of vessels not subject to effective flag-State control cannot, for the most part, be regulated. This will certainly include the high seas, but would also encompass the EEZ, where, although the coastal State would possess the right to protect economic activities, it would lack the jurisdiction to regulate most other actors and activities from whence a threat may come.

Threats from the Global Commons

There are two distinct types of threats that come from the high seas. The first encompasses threats against the ports and territory of a coastal State that originate from the sea. Such threats might be through the shipment of weapons of mass destruction (WMD) or related delivery systems to a port for use against a State or its allies, or the use of a vessel in a direct attack. In the latter case, this could be from a

naval vessel, or could be accomplished using a commercial vessel which has been chartered, commandeered or hijacked and which is destroyed in the port of a State to cause damage to facilities or human life.

The first type of attack has yet to occur in the West, although it has occurred in the Middle East against Western interests.⁹ Even so, threats from shipping have been the focus of a tremendous amount of planning and cooperative effort internationally. The Proliferation Security Initiative¹⁰ and the International Ship and Port Facility Security Code (ISPS Code)¹¹ at an international level, or the United States' Container Security Initiative¹² internally, are excellent examples of responses to this direct threat from the sea. States have moved cooperatively to put in place legal measures designed to protect shipping and maritime infrastructure from terrorist threats, and to better cooperate in sharing data and intelligence.¹³ Significant progress in these areas has been made in a relatively short space of time, especially considering the scale and reach of the measures within the ISPS Code and that they were adopted and functioning well within five years of the 9/11 attacks.¹⁴

The first type of threat in some ways is relatively easily dealt with from a legal point of view. Once a vessel enters the port of a State, unless it is sovereign immune, it becomes subject to the regulation of the port State, whose criminal laws can be applied to activities taking place onboard.¹⁵ An attempt to ship WMD into a port would attract the jurisdiction of the port State, and enforcement action against the ship could be taken inside the port by local authorities. Even if the offending vessel is sovereign immune, it can be asked to vacate the port and the territorial waters of the port State, and must comply in an expeditious fashion. Additionally, the actions of the offending vessel may give rise to a valid claim for damages against the flag State for any breaches of the law of the port State committed by the vessel.¹⁶

Port States can also close the port to international traffic or refuse vessels entry for failure to comply with entry requirements. For example, the Australian Maritime Identification System requires vessels to provide data to Australian authorities of the vessel's crew, cargo, route and previously visited ports. This data is sought when the vessel is within 1,000 nautical miles of the Australian continent. Although there is no territorial jurisdiction to enforce such a measure, it has been effective because failure to provide the data may result in the vessel being refused entry to the port and subsequent arrest if it enters the territorial sea with an intention to proceed to its intended port. The right of entry becomes tied to additional conditions, which can be used to improve security and give operators a clearer picture of the maritime security environment in adjacent waters.¹⁷

The second type of threat is one directed at activities in the global commons. Activities in the commons include transportation, fishing, oil and gas exploitation, and communications via submarine cable. Each of these activities is vulnerable to

attack from ships and aircraft on a range of levels, and it is appropriate to consider each in turn.

Attacks on ships at sea have been a feature of maritime transportation since ancient times. The legal concept of piracy is of great antiquity, and the ability of States to deal with piratical acts against their shipping is quite extensive.¹⁸ The 1982 LOS Convention, codifying existing customary international law, provides for universal jurisdiction over vessels engaged in piracy, provided that enforcement action is undertaken by marked government vessels in areas outside the territorial sea of third States.¹⁹ This potentially gives great freedom of action to flag States to use their armed forces to protect their shipping from pirate activity.

In practice, the availability of universal jurisdiction to deal with piracy has been limited by two key factors. Firstly, universal jurisdiction over piracy is limited to incidents taking place outside the territorial sea. The 1982 LOS Convention retains the paramountcy of the coastal State's sovereignty within the territorial sea, and consistent with the regime of innocent passage, non-coastal State vessels lack the power to effect an arrest of a pirate vessel in these waters.

The second factor is of greater relevance to recent concerns over security. The traditional definition of piracy is the attacking of a vessel in pursuit of personal profit.²⁰ This motivation for profit distinguishes piratical acts from activities with a purely political motivation. Since terrorists are generally not motivated in their attacks by the possibility of personal profit, but rather the advancement of a political cause or the desire to frighten and disrupt lawful activities, it has been accepted that terrorist acts at sea do not fall under the umbrella of piracy.

While attacks on shipping present a threat from the global commons, there are other and different threats posed to other activities taking place in the world's oceans. Oil and gas exploitation of offshore fields means that there are large and expensive facilities permanently moored in areas remote from coastal areas. These platforms, loading facilities and pipelines are extremely vulnerable to hostile action. They are exploiting and storing quantities of flammable gases or liquids, which could be set alight by terrorist action, or alternatively could be the source of significant environmental harm.

Terrorist attacks against oil and gas platforms have not taken place, although the occupation of Brent Spar by Greenpeace in 1995²¹ demonstrated the relative ease with which terrorists could occupy an offshore platform and the difficulties inherent in their removal. Attacks against oil and gas facilities have taken place in the context of armed conflicts, and the facilities are particularly vulnerable. The lack of a terrorist attack has not prevented international concern over the potential threat, and has led to international law providing coastal States and others greater powers to protect such facilities.

Submarine cables and pipelines are also an example of vulnerable assets in the global commons. All States have the right to lay cables and pipelines along the sea floor outside the territorial sea. These cables and pipelines cannot be restricted by the coastal State, although there is a right for coastal States to be consulted with respect to the route such cables or pipelines might take. As with oil and gas platforms, a concrete terrorist threat against these facilities has yet to occur, but the possibility of damage and disruption is not insignificant. Terrestrial attacks against pipelines in Iraq and Nigeria have caused rises, albeit temporary, in world oil prices.²² Attacks against submarine pipelines would have the added difficulties of causing widespread environmental harm, possibly to the EEZ of another State, and be far more expensive and difficult to repair. Submarine cables, especially fiber optic cables, still carry the bulk of the world's telephonic and electronic data, and their disruption could harm world communication in some areas for an extended period.²³

In both cases, the risk of harm from attack is not insubstantial. The locations of pipelines and cables are marked on commercially available charts and the coordinates of cables can be downloaded from the Internet without cost. This because both pipelines and submarine cables are vulnerable to accidental damage by mariners engaged in lawful activities. Notice of their location reduces the risk of harm. The practical upshot of this legitimate and sensible precaution is to make the targeting of such facilities much easier for those engaged in potential terrorist activities against them.

Responses

International law has for many years permitted ships and flag States to protect themselves from attack. The fact that piracy attracts universal jurisdiction in areas beyond the territorial sea emphasizes this fact. Any ship that is subjected to an attack by pirates outside the territorial sea can receive assistance, and the pirates taken into custody by the warships of any State.

In the context of responding to attacks on its nationals or ships flying its flag, a flag State has a right of self-defense and can take steps to protect individuals and ships. This would permit naval escort of ships by the flag State and a right to take action to protect those ships from attack. Difficulties may arise where a State's nationals are onboard vessels that are flagged to another State. This makes efforts at protection problematic, and would require the flag State to consent to warships of another State providing protection. However, the provision of protection to other flagged vessels is by no means impossible with such consent and there is ample precedent for it during times of armed conflict.²⁴ Such difficulties were avoided during the Iran-Iraq war when, after tankers entering the Persian Gulf had come under

fire from Iran, the United States Navy (and navies of other neutral nations) formed convoys of neutral-flag merchant vessels, or escorted or accompanied neutral-flag merchant vessels carrying cargoes to and from neutral States.²⁵

In the context of protecting shipping from terrorist attack, a separate instrument was negotiated under the auspices of the International Maritime Organization (IMO) to facilitate a response. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation²⁶ (SUA Convention) was negotiated as a direct result of the 1985 hijacking of the Italian liner *Achille Lauro*.²⁷ The necessity for an international response was manifested in part because of differences within the international community as to whether the attack constituted piracy. This was because of the requirement that piracy be for “private” ends, and the fact the group that attacked the vessel, the Palestinian Liberation Front, staged the attack for political purposes. Other States, including the United States, considered that the attack amounted to piracy, and were concerned that responses to an incident of this type might be undermined if it were not considered a piratical act.²⁸ Obviously, with this difference of view it was necessary to create an international instrument to clarify the response to what was still manifestly an illegal act.

The response adopted was the 1988 SUA Convention. It dealt with certain acts against shipping, including seizing a ship, acts of violence against individuals on a ship, damage to a ship or its cargo so as to endanger its safe navigation, endangerment of the safety of a ship by interfering with maritime navigational facilities or sending a false signal.²⁹ The purpose motivating the acts is not relevant, and therefore there would be some overlap with piracy, although the scope of the SUA Convention is necessarily much wider. The SUA Convention applies to ships that have journeyed outside the territorial sea of a single State, or are scheduled to pass outside the territorial sea.³⁰ Parties to the SUA Convention have jurisdiction to deal with such offenses, based on the ship’s presence in their territorial sea, possession of their flag or other means.³¹ However, the SUA Convention did not deal directly with the boarding of vessels where jurisdiction might be asserted by another State. The Preamble of the SUA Convention provides “matters not regulated by this Convention continue to be governed by the rules and principles of general international law,” which would limit non-flag State intervention to acts covered under Article 110 of the 1982 LOS Convention, in this context acts of piracy.³² There are also provisions to allow for either prosecution or extradition of individuals believed to have committed offenses.³³

In 2005 the SUA Convention was amended by a new protocol pertaining to maritime terrorism against shipping.³⁴ The focus of the 2005 amendments is weapons of mass destruction (WMD) and their non-proliferation.³⁵ New offenses were created, including using a ship as a platform for terrorist activities,³⁶ and the

transportation of a person who has committed offenses under the SUA Convention,³⁷ or any of another nine listed anti-terrorism conventions.³⁸ The 2005 amendments also widen the scope for third party boarding of ships, although flag-State authorization is still required for such a boarding.³⁹

States also were of the view that maritime terrorism need not be limited to ships, but could also be directed at offshore oil and gas installations. This led to the adoption of a protocol to the SUA Convention (1988 Protocol)⁴⁰ that dealt with similar acts committed against offshore petroleum installations at the same time as the SUA Convention.⁴¹

The 1988 Protocol applies to “fixed platforms,” which is liberally defined to include all petroleum producing structures.⁴² It also limits application to facilities on the continental shelf. This excludes the application of the protocol to installations in the territorial sea of a coastal State, in the ordinary course of events.⁴³ The offenses under the 1988 Protocol are analogous to those under the SUA Convention. These include seizing a platform by force, destruction or damage threatening the safety of a platform, the placing of a device designed to damage or destroy or endanger the safety of a platform, or threats, intimidation, or acts of violence against persons onboard a platform.⁴⁴

States under the 1988 Protocol have a similar jurisdictional envelope as under the SUA Convention. The 1982 LOS Convention makes it clear that States have jurisdiction over offenses taking place on fixed platforms on their continental shelf, and this is confirmed in the 1988 Protocol.⁴⁵ In addition, under the Protocol, States also have jurisdiction if either the offender or the victim is a national of the State, if the offender is stateless and a habitual resident of the State, or if the offense is intended to coerce the State concerned.⁴⁶

The 1988 Protocol does not deal with the issue of boarding of fixed platforms, and as with the SUA Convention, the preamble reiterates “that matters not regulated by this Protocol continue to be governed by the rules and principles of general international law,” apparently limiting direct unilateral intervention against acts against platforms to the coastal State. This was to ensure that a coastal State would retain sole jurisdiction over activities on its platforms, and another State could not assert it had a right to board a platform, based on having jurisdiction over an offense. The absence of a boarding provision would not prevent a coastal State from giving a third State an ad hoc authorization to board its installation.

The 1988 Protocol was also amended by protocol in 2005,⁴⁷ with amendments similar in nature to the 2005 SUA Convention amendments. New offenses, including using explosives or radioactive material or a biological, chemical, nuclear (BCN) weapon to cause death, serious injury or damage to an installation;⁴⁸ releasing oil or gas from an installation in a manner calculated to cause death, serious

injury or damage;⁴⁹ or the threat to commit such offenses,⁵⁰ were created.⁵¹ A State party must take the measures necessary to apply its jurisdiction to its nationals and fixed platforms on its continental shelf in respect to these offenses.⁵² Much of the rest of the SUA Convention and the 2005 amendments, in relation to extradition, cooperation concerning data and evidence, and domestic implementation, are applied by the 2005 Protocol *mutatis mutandis*.⁵³

The 2005 SUA Convention amendments and 1988 Protocol amendments will enter into force after the twelfth ratification without reservation⁵⁴ for the SUA Convention amendments⁵⁵ and ninety days after the third ratification without reservation⁵⁶ for the Protocol amendments.⁵⁷ Given the current wide participation in the SUA Convention and 1988 Protocol, both the Convention amendments and Protocol amendments are likely to enter into force relatively quickly.

Responses in relation to the protection of submarine cables and pipelines have been less forthcoming. The 1982 LOS Convention does provide that a coastal State must be consulted over the route a cable or pipeline on its continental shelf may take, but not that the coastal State has jurisdiction over the cable or pipeline.⁵⁸ If a cable or pipeline owned by a coastal State or its nationals were damaged, the LOS Convention provides that the flag State of the vessel, or of the nationality of the offender responsible, has jurisdiction to deal with the harm caused.⁵⁹ A coastal State could only assert jurisdiction in the event the damage to the cable or pipeline also caused harm to the environment, on the basis of the coastal State's EEZ jurisdiction.⁶⁰

A coastal State asserting jurisdiction over an attack on a pipeline presents more options than the situation for submarine cables. An attack on an oil pipeline would probably cause environmental damage, and therefore provide a basis for a coastal State to assert its jurisdiction.⁶¹ Article 79(4) of the 1982 LOS Convention creates an implication that a coastal State can make laws dealing with leaks from pipelines. A coastal State might also respond to an attack on a cable or pipeline on the basis of self-defense. To do so it would need to demonstrate the importance of the threatened infrastructure to itself, and that a use of force is proportionate in the circumstances. This will always be a question of fact, and would be dependent upon the cable being vital telecommunications infrastructure, or a pipeline carrying essential oil or gas for the national economy.⁶² Even in those circumstances, an isolated attack, not immediately detected by the coastal State, or indeed other States using the cable or pipeline, might make it difficult to justify a response involving the use of force.

One way to increase the ability of States to respond to attacks on pipelines and submarine cables might be to base an argument upon Article 3*bis*(1)(a)(iii) of the 2005 SUA Convention amendments. This provision creates an offense where an individual "uses a ship" to cause damage.⁶³ If the employment of a ship to aid

terrorists in attacking a cable or a pipeline could be described as a “use” of a ship in the context of Article 3*bis*, then there could be jurisdiction. It is submitted that such a wide definition is almost certainly beyond the anticipated scope of the offense. If the definition could sustain such stretching, the consent of the flag State would still be required to effect a boarding,⁶⁴ and the flag State be a party to the 2005 Protocol amending the SUA Convention.

Placing jurisdiction over pipelines and submarine cables outside the territorial sea in the control of the flag State of the offending vessel is, under the 1982 LOS Convention, problematic. If terrorists attacked a pipeline or cable with a chartered vessel, perhaps a fishing trawler, the vessel may well be flagged in a State with an open registry. This would substantially undermine the prospects of enforcement action, as it is clear that a number of States with open registries that have attracted fishing vessels, such as Georgia, Togo or Equatorial Guinea,⁶⁵ have no capacity to deal with attacks even close to their coasts.

Reliance on flag-State jurisdiction in the context of cables and pipelines serves to highlight a broader problem, that is, the limitations of flag-State jurisdiction over vessels. While the jurisdiction of a flag State remains the paramount mechanism to determine the applicable law aboard a vessel, in the case of States with open registries the connection to flag States can be so diffuse as to be meaningless. In that circumstance, it is difficult to conceive that effective enforcement at sea can take place. Flag-of-convenience States have no capacity to enforce their laws on ships flying their flag around the world, and may have little incentive to cooperate with other States to remedy the deficiency. The United States has sought to tackle the problem in the context of the Proliferation Security Initiative with boarding agreements with a number of States with open registries, including Liberia and Panama;⁶⁶ they fall short of permitting boarding in a wider range of circumstances.

Conclusion

The international community has shown great energy in tackling threats in the global commons. The SUA Convention and Protocol in their 2005 iterations represent a substantial and positive step forward in the legal protection of ships and platforms in the global commons beyond the territorial sea. However, it is apparent that States have yet to create protection for the totality of activities that take place beyond the territorial sea. Adequate jurisdictional mechanisms to ensure an effective response to attacks on submarine cables and undersea pipelines do not exist, nor does it appear there are international efforts in progress to remedy the

situation. It can only be hoped that it is not the reality of an attack that acts as the catalyst to produce positive change in these areas.

Notes

1. The United States, the British Empire and France all maintained 3 nautical mile territorial seas until after World War II. The Scandinavian nations asserted 4 nautical mile territorial seas from the late eighteenth century until after the war. See D.P. O'CONNELL, 1 *THE INTERNATIONAL LAW OF THE SEA* 131–138 (I.A. Shearer ed., 1982).

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1834 U.N.T.S. 396 [hereinafter 1982 LOS Convention].

3. Article 76 of the Law of the Sea Convention deals with the limits of the continental shelf.

4. *Id.*, art. 1(1).

5. *Id.*, art. 136.

6. *Id.*, art. 56.

7. *Id.*, art. 58(1).

8. *Id.*

9. For example, the separate attacks in Aden harbor against the French flagged tanker *MV Limburg* and the US destroyer *USS Cole* (DDG 67) would fall into this category. See Jessica Romero, *Prevention of Maritime Terrorism: The Container Security Initiative*, 4 *CHICAGO JOURNAL OF INTERNATIONAL LAW* 597, 598 (2003).

10. See generally Stuart Kaye, *Proliferation Security Initiative in the Maritime Domain*, in *INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM* 141–64 (Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006) (Vol. 81, US Naval War College International Law Studies).

11. See generally Rachael B. Bralliar, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, 185 *MILITARY LAW REVIEW* 1, 23–35 (2005).

12. See generally Romero, *supra* note 9; Math Noortmann, *The US Container Security Initiative: A Maritime Transport Security Measure or an (inter)National Public Security Measure?*, 10 *IUS GENTIUM* 139 (2004).

13. See generally Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 *HARVARD INTERNATIONAL LAW JOURNAL* 131 (2005); Justin S. C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 *AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW* 341 (2002).

14. See generally Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 *TULANE MARITIME LAW JOURNAL* 1 (2006); Thomas J. Schoenbaum & Jessica C. Langston, *An All Hands Evolution: Port Security in the Wake of September 11th*, 77 *TULANE LAW REVIEW* 1333 (2003).

15. See *Wildenhus's Case*, 120 U.S. 1, 12 (1887).

16. 1982 LOS Convention, *supra* note 2, art. 31.

17. Natalie Klein, *Legal Implications of Australia's Maritime Identification System*, 55 *INTERNATIONAL & COMPARATIVE LAW QUARTERLY* 337 (2006); Cameron Moore, *Turning King Canute into Lord Neptune: Australia's New Offshore Protection Measures*, 3 *UNIVERSITY OF NEW ENGLAND LAW REVIEW* 1 (2006).

18. IVAN A. SHEARER, *STARKE'S INTERNATIONAL LAW* 247–250 (1994); Hersch Lauterpacht, 1 *INTERNATIONAL LAW: A TREATISE* 557–567 (1948).

19. 1982 LOS Convention, *supra* note 2, arts. 107 and 110.

20. *Id.*, art. 101.

21. See <http://www.greenpeace.org/international/about/history/the-brent-spar> (last visited Feb. 20, 2007).

22. See, e.g., Jaime Wilson, *Iraq hit by Fresh Attack on Oil Pipeline*, THE GUARDIAN (London), Aug. 18, 2003, at 1, available at <http://www.guardian.co.uk/Iraq/Story/0,,1020878,00.html>; Edward Harris, *Nigerian Militants Attack Oil Pipeline, Boat*, DESERET NEWS (Salt Lake City), Feb. 21, 2006 available at http://www.findarticles.com/p/articles/mi_qn4188/is_20060221/ai_n16162905.

23. For example, the value of submarine cables to Australia alone has been estimated at over US \$5 billion per year to the national economy. See Australian Communications and Media Authority, *Information Sheet, Proposed Protection Zones Off Sydney, New South Wales*, http://www.acma.gov.au/acmainterwr/_assets/main/lib100668/information%20sheet.pdf (last visited Feb. 27, 2007).

24. For example, Allied convoys during both World War I and World War II were escorted by a range of Allied warships and contained a variety of Allied merchant shipping.

25. GEORGE K. WALKER, *THE TANKER WAR, 1980–88: LAW AND POLICY* 363 (2000) (Vol. 74, US Naval War College International Law Studies).

26. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201 [hereinafter SUA Convention].

27. Malvina Haberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 347, 349 (1985). In 1985 the IMO adopted Assembly Resolution A. 584(14) to encourage States to take measures to combat terrorist activity against ships.

28. Samuel Pyeatt Menefee, *Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity* 5 INTERNATIONAL LAW STUDENTS ASSOCIATION JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 309, 310–313 (1999); Haberstam, *supra* note 27, at 270–291.

29. SUA Convention, *supra* note 26, art. 3.

30. *Id.*, art. 4.

31. The SUA Convention also contemplates jurisdiction based on passive personality, or attempted coercion of the State concerned. See *id.*, art. 6.

32. The deficiency was to some extent addressed by Article 8 of the SUA Convention, which provided a mechanism for the master of a vessel to hand individuals over to a “receiving State,” other than the flag State. See *id.*, art. 8.

33. *Id.*, art. 10.

34. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Oct. 14, 2005, IMO Doc. LEG/CONF. 15/21, available at <http://www.austlii.edu.au/cgi-bin/displ/au/other/dfat/treaties/notinforce/2005/30.html?query=suppression%20of%20unlawful%20acts>. [hereinafter 2005 SUA Safety of Maritime Navigation Protocol].

35. *Id.*, art. 3*bis*.

36. *Id.*, art 3*bis*(1)(a)(3).

37. *Id.*, art 3*ter*.

38. *Id.*, Annex.

39. *Id.*, art 8. See the discussion in Ted L. McDorman, *Maritime Terrorism and the International Law of Boarding Vessels at Sea: Assessing the New Developments*, <http://www.law.berkeley.edu/centers/ilr/ona/pages/mcdorman.htm> (last visited Feb. 20, 2007).

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40. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304 [hereinafter 1988 SUA Protocol].

41. HOSSEIN ESMAELI, *THE LEGAL REGIME OF OFFSHORE OIL RIGS IN INTERNATIONAL LAW* 132 (2001).

42. 1988 SUA Protocol, *supra* note 40, art. 1. This definition includes artificial islands, installations and structures engaged in exploration or exploitation of the seabed or some other economic purpose.

43. *Id.*, art. 1(2).

44. *Id.*, art. 2(1). The offenses include attempting, abetting and threatening to commit an offense. *Id.*, art. 2(2).

45. Given that Article 60 of the Law of the Sea Convention gives a coastal State exclusive jurisdiction to regulate the operation and use of an installation, and the Protocol does not displace general international law upon matters to which it does not address itself. *Id.*, Preamble.

46. *Id.*, art. 3.

47. Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Oct. 14, 2005, IMO Doc. LEG/CONF. 15/22, available at <http://bar.austlii.edu.au/au/other/dfat/treaties/notinforce/2005/31.html> [hereinafter 2005 Fixed Platforms Protocol].

48. *Id.*, art. 2*bis*(a).

49. *Id.*, art. 2*bis*(b).

50. *Id.*, art. 2*bis*(c).

51. *Id.*, art. 2*ter*.

52. *Id.*, art. 3(1).

53. *Id.*, art. 1.

54. 2005 SUA Safety of Maritime Navigation Protocol, *supra* note 34, art. 18.

55. Only State parties to the SUA Convention who have made no reservations to the application of that Protocol can become parties to the 2005 SUA Convention amendments. *See id.*, art. 17.

56. 2005 Fixed Platforms Protocol, *supra* note 47, art. 9.

57. Only State parties to the SUA Protocol who have made no reservations to the application of that Protocol can become parties to the 2005 SUA Fixed Platforms Protocol. *See id.*, art. 8.

58. 1982 LOS Convention, *supra* note 2, art. 79.

59. *Id.*, art. 113.

60. *Id.*, art. 79(4).

61. See discussion in 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 909–917 (Myron H. Nordquist ed., 1993).

62. For example, see W. Michael Reisman, *International Legal Responses to Terrorism* 22 HOUSTON JOURNAL OF INTERNATIONAL LAW 3, 55–8 (1999); Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses* 11 CARDOZO JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1, 40–1 (2003).

63. 2005 SUA Safety of Maritime Navigation Protocol, *supra* note 34, art. 3*bis*(1).

64. *Id.*, art. 8*bis*(5)(b).

65. These States were identified by the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR) as “flags of non-compliance” in 2005. *See* CCAMLR Annual Report, Report of the Standing Committee on Implementation and Compliance, Annex 5, available at http://www.ccamlr.org/pu/e/e_pubs/cr/05/a5.pdf (last visited Feb. 20, 2007).

66. Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of

Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea, Feb. 11, 2004, *available at* <http://www.state.gov/t/isn/trty/32403.htm>. Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004, *available at* <http://www.state.gov/t/isn/trty/32858.htm>.

VI

Preemption by Armed Force of Trans-boundary Terrorist Threats: The Russian Perspective

Bakhtiyar R. Tuzmukhamedov*

A zealous legalist would argue that Russia, or rather its predecessor the Soviet Union, has repeatedly demonstrated its inclination to use armed force in the absence of an actual attack against itself. Precedents that would likely be cited include the “Winter War” of 1939–40 against Finland, and the interventions in Hungary in 1956 and in Czechoslovakia in 1968. Some might add the deployment to Afghanistan in 1979 or, in paradoxical contradistinction to those examples, the Wehrmacht attack against the USSR which was launched in 1941, at least as claimed by Nazi leaders and some contemporary historians, to forestall an imminent Red Army assault.

Whatever the merits of those alleged precedents, in its declaratory policy and formal acts, the Soviet Union abided by a rather narrow, or restrictive, interpretation of the principle of non-use of force. It acceded to the Treaty for the Renunciation of War (the Kellogg-Briand Pact) of 1928¹ and was a party to the Convention for the Definition of Aggression of 1933.² Although the latter might seem a less classical source, Justice Jackson in his opening address for the United States at the

* Professor, Diplomatic Academy, Moscow, Russia. The views expressed herein are solely those of the author.

Nuremberg Military Tribunal described it as “one of the most authoritative sources of international law on this subject.”³

In a conspicuous departure from the Soviet-era official and doctrinally strict, i.e., narrow, interpretation of the right of self-defense, Russian officials have, since 2002, increasingly been indicating that it might be permissible to use armed force against extraterritorial sources of imminent threat to Russian security, even in the absence of an actual armed attack originating from those sources. Those statements, made by politicians, senior military commanders and ultimately by the president, were enthusiastically endorsed by a handful of Russian legal academics.⁴ The qualifier that usually accompanies the term “use of force” is “preventive,” and Russian official statements do not seem to be sensitive to nuances of meaning between that and other adjectives, such as “preemptive,” or “anticipatory,” or “interceptive.”⁵ As to the location and nature of the sources of those threats and the targets of the preventive use of force, while earlier declarations announced an intention to engage them globally,⁶ their personality notwithstanding, eventually the declarations came to express a readiness to deal with sources of terrorist threats in the space adjacent to the Russian territory.

The earlier remarks that caught international attention had been made in July and August 2002 by Defense Minister Sergey Ivanov and other military commanders, and several ranking parliamentarians. These statements, incidentally, were made soon after President George W. Bush broached preemption in his commencement address at the US Military Academy.⁷

Those statements were prompted by the events that occurred on the Russian-Georgian border. Russia claimed that Chechen insurgents found refuge in the Pankissi Gorge in Georgia, an area where Georgian law and order was nonexistent. The area was convenient for insurgent rest and recreation, and to regroup and re-enter Russian territory. Those allegations had been vehemently denied by Georgian authorities, although apparently the US “Train and Equip” mission to Georgia⁸ had, as one of its principal objectives, the establishment of viable indigenous law-enforcement units that could regain control over the mountainous and hard-to-reach Pankissi Gorge area. Russian politicians asserted that even though Georgian authorities could not be implicated beyond doubt in providing shelter to insurgents, they definitely lacked the capability and determination to deny access to and freedom of insurgent activity in the area.

President Putin in his statement on September 11, 2002 commemorating the victims of the 9/11 terrorist attack against the United States looked for legal support for the Russian position. He said that “should the Georgian leadership be unable to secure the area adjacent to the border and continue to ignore the UN SC Resolution 1373 of 28 September, 2001 . . . , we shall reserve the right to act in

accordance with Article 51 of the UN Charter that entitles every member-State of the United Nations to enjoy an inherent right to individual or collective self-defense.”⁹ President Putin went further and instructed the uniformed services to draft engagement plans “to pursue terrorists and destroy their bases that have been reliably located and identified.”¹⁰

That statement by President Putin prompted an angry response from the Council of Europe whose Parliamentary Assembly insisted that “Article 51 of the UN Charter and Resolution 1269 (1999) of the UN Security Council, as well as Resolution 1368 (2001) of the UN Security Council of 12 September do not authorize the use of military force by the Russian Federation or any other State on Georgian territory.”¹¹ It further called on the Russian authorities to refrain from “launching any military action on Georgian territory as expressed by the President of the Russian Federation on 11 September 2002.”¹²

Not only was the Parliamentary Assembly’s declaration rather unfair to President Putin, it was also inaccurate. The Russian president looked to Security Council Resolution 1373 for authority, and that reference was conspicuously ignored by the Council of Europe. It should be recalled that Resolution 1373 specifically urged UN member-States to deny terrorists movement across borders and to ensure that refugee status is not granted to persons suspected of terrorist activity.¹³ Russia was concerned that Georgia was unable or unwilling to abide by those and other provisions of the resolution. Additionally, President Putin had not ordered that immediate military action be undertaken on the territory of a sovereign State. Rather, he ordered that contingency plans be made, conditional on Georgia’s capacity to effectively control its own territory.

Putin’s statement may also be interpreted as an implicit extrapolation, whether conscious or not, of the right of hot pursuit from the realm of the law of the sea¹⁴ to trans-boundary law-enforcement. His phrase about “pursuit of terrorists” obviously alluded to situations when culprits would be pursued and apprehended, or accounted for, either on the Russian territory, or, pursuit having commenced on the Russian territory and continued across the border, on the territory of an adjacent State.¹⁵ It is also worth noting that the Russian president construed Article 51 of the UN Charter as entitling a State to the right of self-defense against an armed attack by actors other than a State.

It is true that Article 51 does not unequivocally refer to a State as a perpetrator of an attack; however, if one were to accept that “Article 2 (4) explains what is prohibited, Article 51 what is permitted,”¹⁶ and Article 2 (4) refers to relations between members of the United Nations, that is, States, then Article 51 should apply to States, too. It should be recalled that in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the

International Court of Justice uttered a dictum, albeit argumentative, that “Article 51 of the Charter recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”¹⁷

While suspected terrorist bases in certain neighboring countries and prospective targeting of those bases have been a recurring theme in remarks by Russian senior officials since 2002, most often they have not been country-specific.¹⁸

In most instances, the statements describing situations that would justify the employment of the armed forces beyond Russian territory to preempt an attack are related to a terrorist threat. Occasional references to threats to lives and security of large numbers of Russian citizens or a “Russian-speaking population” imply military support for their evacuation from a zone of an armed conflict or a humanitarian disaster. Even fewer statements are also made that it is admissible to use force preemptively to meet the demands of unspecified “Russian interests” or of its alliance commitments.

The declared targets of forceful action are individual terrorists, organized groups of terrorists and their bases. The means to be used in a preemptive strike against those targets are almost unrestricted, nuclear arms being the only clear exception. According to the defense minister, such a strike would not amount to full-fledged combat action, but would be delivered “to avert a single terrorist threat.”

As to the geography of preemptive action, it is realistic to look at areas adjacent to Russian territory. An utterance by the chief of the General Staff that those strikes could be delivered “anywhere on the globe”¹⁹ appeared inconsistent with the statements of the commander-in-chief addressing “interdiction of organized terrorist groups attempting to penetrate our territory” and “pursuing and engaging terrorists.”²⁰

Official declarations always underscored that Russian forces will target terrorists and their infrastructure, rather than persons and institutions of a sovereign State on whose territory the former found refuge. Whether done consciously or not, this seems to be an attempt to stave off prospective charges of committing an act of aggression. It is worth noting that political and military leaders never miss a chance to underscore that armed force would be used in strict compliance with the constitution, statutes and international law.

So far those declarations have not comprised a comprehensive official doctrine explaining under what circumstances and according to what criteria Russia would be inclined to use a military tool to meet a ripening threat. The constitution, however, addresses “an imminent threat of aggression”²¹ against the Russian Federation (Article 87.2), in which case the president shall introduce martial law by a decree. A decree on the introduction of martial law and a decree on the introduction of the

state of emergency are the only acts by the president that require approval by the Council of Federation; all other decrees remain his unilateral prerogative.

The federal constitutional law “On Martial Law” describes the imminent threat of aggression as “activities by a foreign State (States) committed in violation of the UN Charter and generally recognized principles and norms of international law that immediately indicate that an act of aggression against the Russian Federation is being prepared, including the declaration of war against the Russian Federation” (Article 3.3).²² The legal gap is further filled by a recent federal law “On Counter-acting Terrorism” of 2006,²³ as amended, which supersedes an earlier federal law “On Combating Terrorism” of 1998,²⁴ as amended.

The new law explicitly provides for the use of armed force against targets outside Russian territory, on the high seas and, presumably, in international airspace. In this context, it does not speak about preemption; however, the broad range of tasks indicates that military power might be required to deal with threats that are not necessarily imminent.

Terrorism is defined in very broad terms as “an ideology of violence and practical impact on the decision making by bodies of State power, bodies of local self-government and international organizations, by way of intimidation of population and/or by other illegal violent actions” (Article 3(1)). The law is more specific when it further defines “terrorist activity” as comprising such diverse elements as planning, preparation, funding and perpetration of a terrorist act; incitement to commit a terrorist act; organizing a terrorist group; recruiting, arming and training of terrorists; complicity in planning and committing a terrorist act; and propagandizing of terrorist ideology and calls to engage in it. Finally, a terrorist act is defined as “explosion, arson or other acts intimidating population and putting human life at risk of death, leading to substantial loss of property, or to other grave consequences, with an intent to exert impact on the decision making by bodies of State power or international organizations, as well as a threat to commit those acts with same purposes” (Article 2(3), as amended).²⁵ It is against those acts, or perpetrators thereof, or means employed to commit them that the armed forces shall be used under the new law.

The law is conspicuously vague as to the outer limits of the airspace where the military may be ordered to engage a terrorist threat. It does not speak about international airspace. Moreover, it refers to an aircraft “not responding to radio messages from ground controllers to cease violating the rules of navigation in the airspace of the Russian Federation, or to radio messages and visual signals being transmitted by the aircraft of the Russian Armed Forces” (Article 7(2)). Unaddressed is the question of whether that provision could come into conflict with Article 3 *bis* of the Chicago Convention of 1944.²⁶

Turning to sea space, the law refers to internal waters and the territorial sea, as well as to the continental shelf and to “national maritime navigation.” Obviously, the continental shelf may extend as far as 350 nautical miles from the baselines. As to “national maritime navigation,” it is not immediately clear whether the law implies navigation within territorial limits or extends to ships flying the Russian flag anywhere on the seas, with a possible exception of those chartered by foreign entities.

There is no need, however, to read between the lines of the law to deduce grounds for the use of the Russian military against terrorist targets beyond national borders. Article 10 specifically addresses the issue of trans-boundary deployment of units, as well as engagement of targets outside Russian territory without crossing the border.²⁷ Remarkably, the law never mentions foreign territory as an area of deployment; rather, the phrase that is used in the lead-in paragraph of Article 10.1 is “interdiction of international terrorist activity beyond territorial bounds of the Russian Federation.”

As to internal procedures, the order to fire at terrorists from Russian territory will be given by the president unilaterally in the exercise of his constitutional powers as the supreme commander-in-chief. To send troops across the border, the president would first need to obtain consent from the Council of Federation.²⁸ While the original version of the law required that the president submit information regarding the proposed strength of the unit, the areas of deployment and its duration, that provision was deleted by the Federal Law of July 27, 2006.²⁹

The law addresses “the interdiction of terrorist activity,” which implies preemption due to the broad range of elements of “terrorist activity” as they are defined by the law. The law makes a general reference to international treaties as sources of authority, along with Russian legislation, for trans-boundary employment of the armed forces; however, soon after the adoption of the federal law “On Counteracting Terrorism,” Defense Minister Sergey Ivanov stated that the law by itself provides sufficient grounds for unilateral and preemptive use of force against terrorist targets on foreign soil.³⁰

This author is not qualified to appraise the true capacity of the Russian military to engage terrorists who threaten Russian citizens and assets abroad. Unfortunately, however, the recent drama with Russian embassy personnel in Baghdad sadly proved that neither Russia nor local authorities, not even the occupying powers, were able to control the hostage crisis or save lives of internationally protected persons.³¹

The law “On Counteracting Terrorism” lists several principles, some of which would sound similar to ones found in the established international law. For example, consider the principle of “proportionality of measures undertaken to counter

terrorism to the level of terrorist threat” (Article 2 (2)). One can immediately trace the origins of that principle back to the 1837 *Caroline* incident, in which the *Caroline*, a vessel used to supply Canadian rebels fighting British rule, was captured, set ablaze and sent over Niagara Falls. One US citizen perished.

Several Soviet, and now Russian, students of international law have at least acknowledged the *Caroline* doctrine, and some have given it a careful examination.³² While it has not been widely accepted in Russia, some of the official statements regarding the preemptive use of force could be construed as falling within the purview of the *Caroline* doctrine, which, if properly adapted, could add a degree of legitimacy to current approaches.

Traditionally, the most often quoted source for the *Caroline* doctrine has been a paragraph in the diplomatic note from Daniel Webster, the US secretary of state, to Henry Fox, the British minister in Washington, DC, dispatched on April 24, 1841. It is from this note that current international law derives the principles of necessity and proportionality.³³ But we might discover no less substantive statements on questions of law in other parts of Webster’s letter, as well as in a later note from Lord Ashburton, the British minister plenipotentiary on special mission, to Secretary Webster, and in the address of President Tyler to the US Congress in the aftermath of the *Caroline* case.³⁴

If the Russian government were to contemplate putting into effect provisions of the federal law “On Counteracting Terrorism” that regulate deployment of Russian armed forces outside Russian territory, it might consider several decision-making guidelines on the preemptive use of force—first and foremost, necessity and proportionality. Recourse might be had to Lord Ashburton’s allusion to circumstances under which the principle of “inviolable character of the territory of independent nations”³⁵ could be suspended. According to the British minister, “it must be so for the shortest possible period, during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity.”³⁶ That limitation could be developed further to include severe restrictions on the choice of target, which should only be the immediate source of the threat, and that that source ought to be in the space adjacent to the State’s own territory. The decision should also include consideration of the scale of the threat and the expected gravity of the consequences of inaction.

A decisive argument in favor of a preemptive use of force would be the explicit consent to or request of a State on whose territory the source of the threat is located because that State is not capable of coping with it. It might be worthwhile to consider an attack if a neighboring State, on whose soil or under whose flag on the high seas or in international airspace the threat is maturing, is expressly unwilling to control it.

A unilateral resort to force might have to be considered if the imminence of threat does not leave time to refer the issue to the United Nations Security Council or to a regional arrangement, or if there is a continual record of passivity of those institutions in similar situations, but in any case the Security Council will have to be notified to comply with requirements of Article 51 ("Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council. . .") of the UN Charter. That means that the existence of a threat, its gravity and imminence will have to be proven beyond reasonable doubt, and that, in turn, would necessitate the disclosure of sources and means of collection of information, bearing in mind that what one party would deem to be waterproof evidence justifying a preemptive strike, could be strongly rejected by another party. Resort to armed force would also be proof that other means, including diplomatic and law-enforcement, turned out to be ineffective, or may have been used unskillfully.

A State using armed force to divert a seemingly imminent attack shall be expected to bear full responsibility for injuries and damages inflicted upon innocent persons and their property. A precursor for those injuries might well be inaccurate information about the exact location of a source of terrorist threat and its preparedness for an attack.

Finally, the location and duration of preemptive action must be clearly defined to the personnel involved in it, who should be given precise orders and rules of engagement. No action may commence without reliable and executable plans of evacuation.

Those guidelines are general and some are self-evident. They would need to be made specific for a particular contingency.

Russia is not the only State that declared its intention to use, as an extreme means, armed force to eliminate an imminent threat of a massive terrorist attack and, should dire need arise, project its force beyond its borders. Of course, those making such statements should make sure that resolute declarations are supported by adequate resources and the strong will to use them. Otherwise those declarations are likely to be counterproductive and self-harming.

There is a question that could bother a zealous legalist: as more nations, some of them bearing enormous might, submit that they would use armed force in self-defense not only to react to an actual attack, but also to preempt an imminent assault, or even prevent it from materializing in the future, would it not give impetus to claims that a customary rule of international law has already been conceived?³⁷

Notes

1. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 *available at* <http://www.fletcher.tufts.edu/multi/texts/historical/bh115.txt>.
2. Convention for the Definition of Aggression, July 3, 1933, 147 L.N.T.S. 52, *available at* <http://www.letton.ch/lvx33da.htm>.
3. 2 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945 to 1 October 1946, at 98, 148.
4. E.g., S. Goltsov & Yu Maleev, *Primeneniye Vooruzhennoy Sily Gosudarstvom Kak Mera Preventivnoy Samozashchity Ad Hoc ot Vneshney Ugrozy* (The Use of Armed Force by State as a Measure of Ad Hoc Preventive Self-Protection From an External Threat), 4 MOSCOW JOURNAL OF INTERNATIONAL LAW 45 (2004).
5. The latter term may be attributed to YORAM DINSTEIN. *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENCE 190–92 (4th ed. 2005).
6. Chief of the General Staff General Yuri Baluyevsky warned that strikes could be delivered “anywhere on the globe.” KRASNAYA ZVEZDA (THE RED STAR), Sept. 9, 2004.
7. President George W. Bush, Graduation Address at West Point (June 1, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.
8. Information on the Georgia Train and Equip Program may be found on the website of the US embassy in Georgia at <http://georgia.usembassy.gov/gtep.html>.
9. President Vladimir Putin, Statement Commemorating the Victims of the 9/11 Attacks (Sept. 11, 2002), *available at* <http://president.kremlin.ru/text/appears/2002/09/29426.shtml>.
10. *Id.*
11. PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, The situation in Georgia and its consequences for the stability of the Caucasus region, 28th sitting, Recommendation 1580 (2002), *available at* <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EREC1580.htm>.
12. *Id.*
13. In that Resolution (U.N. Doc. S/RES/1373 (Sept. 28, 2001)), the Security Council decided that “all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents” (para. 2g), and called upon all States “to ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists” (para. 3g).
14. The 1982 United Nations Convention on the Law of the Sea expounds the right of hot pursuit in the homonymous Article 111:
 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be

within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply *mutates mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

15. In an attempt to foresee and deal with the consequences of possible intrusions of foreign law enforcement officers, members of the Commonwealth of Independent States negotiated and signed on June 4, 1999 the Treaty on the Procedures for the Stay of, and Interaction Between, Law-Enforcement Officers on the Territories of States-Members of the Commonwealth of Independent States. While such stays, as a general rule stated in the opening two sentences of Article 6(1), should have the consent of the receiving State, the remaining provisions of that paragraph allowed for restricted non-consensual penetration of a foreign territory in "hot pursuit" of persons who committed criminal offenses on the territory of a party engaged in such pursuit. The treaty allowed for such penetration if timely and proper notification and a request for permission was impracticable. While effective February 6, 2001, the treaty was not ratified by Russia or Georgia. For official publication of the treaty, see SODRUZHESTVO (COMMONWEALTH), THE INFORMATION BULLETIN OF THE COUNCIL OF HEADS OF STATE AND COUNCIL OF HEADS OF GOVERNMENT OF THE CIS, No. (32), at 27–33. On December 22, 2006 the Chairman of the Government of the Russian Federation signed an executive order instructing the Ministry of Foreign Affairs to notify the depositary of the treaty of Russia's "intention not to become a Party" thereof. *Sobraniye Zakonodatel'stva Rossiyskoy Federatsii* (The Collection of Laws of the Russian Federation) No. 52 (Part III), art. 5640 (Dec. 2006) [hereinafter SZ RF].

16. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 240 (1994).

17. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 56 (July 9), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

18. For a more extensive discussion of statements made by senior Russian officials and respective citations, see Bakhtiyar Tuzmukhamedov, *Uprezhdayushchee Primenenie Sily: Vozmozhniye Kriterii Dopustimost* (Pre-Emptive Use of Force: Conceivable Criteria of Permissibility), RUSSIAN YEARBOOK OF INTERNATIONAL LAW 2005, at 47 (2006).

19. *Supra* note 6.

20. *Supra* note 9.

21. The Russian Constitution and statutes apply the term “aggression” at variance with its use in the UN Charter and with the definition of aggression within the meaning of UN General Assembly Resolution 3314. Under the latter, the act of aggression is to be established by the UN Security Council, rather than by a national authority, and until the Council has acted, a trans-boundary use of armed force remains an armed attack. G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th plen. mtg., U.N. Doc. A/RES/3314 (Dec. 14, 1974). President Putin repeatedly referred to incursions of insurgents from Chechnya, a constituent entity of the Russian Federation, into Dagestan, another such entity, as “aggression.” See, e.g., the Russian official version of his interview on *Larry King Live*, Sept. 8, 2000 at http://president.kremlin.ru/appears/2000/09/08/0000_type63379_28866.shtml. His words, “direct aggression,” were translated into English as “armed direct attack” in the transcript of the show at <http://transcripts.cnn.com/TRANSCRIPTS/0009/08/lkl.00.html>. However, the term “aggression” applies to a trans-boundary armed attack, rather than to a use of armed force confined to national borders, and it should not be attributed to non-State actors unaffiliated with governments; otherwise, such attribution might offer extra weight to such actors’ claims to official status. President Putin occasionally demonstrates awareness that the way he applies the term “aggression” may not be proper in the legal sense. In the aftermath of the 1999 insurgent attack into Dagestan, he spoke about the “fearless resistance to aggression” of the Dagestani citizenry. But, according to Putin, “It should be said that if we abstract ourselves from precise legal terms, that indeed was an aggression committed by international terrorists.” See http://president.kremlin.ru/appears/2000/12/29/0000_type63376type63378_59511.shtml.

22. SZ RF No. 2, art. 375 (Feb. 2002).

23. SZ RF No. 11, art. 1146 (Mar. 13, 2006).

24. SZ RF No. 31, art. 3808 (Aug. 13, 1998).

25. In the absence of a universally recognized conventional definition of terrorism, the UN Security Council suggested a legal ersatz definition according to which terrorism may be described as

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

26. The amendment, known as Article 3 *bis*, was adopted on May 10, 1984. It was prompted by the downing nine months earlier by Soviet Air Defense of the Korean Air Lines Boeing 747-200 Flight KAL 007. It provides as follows:

a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

c) Every civil aircraft shall comply with an order given in conformity with paragraph b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph a) or derogate from paragraphs b) and c) of this Article.

Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft, ICAO Doc. 9437, A25-Res. (May 10, 1984), *reprinted in* 23 INTERNATIONAL LEGAL MATERIALS 705 (1984).

27. The latter is described as “employment of armaments from the territory of the Russian Federation against terrorists and (or) their bases beyond” the territory of the Russian Federation (Art. 10.1 (1)).

28. Article 102.1(d) of the Russian Constitution delegates to the Council of Federation the power of “making decisions on the possibility of the use of the Armed Forces of the Russian Federation outside the territory of the Russian Federation.” Until the adoption of the federal law “On Counteracting Terrorism,” that provision had been invoked to authorize the deployment of Russian units to international peacekeeping operations. For an in-depth discussion of the distribution of national defense powers in Russia, see Bahktiyar Tuzmukhamedov, *Russian Federation: the pendulum of powers and accountability*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 257 (Charlotte Ku & Harold K. Jacobson eds., 2002).

29. SZ RF No. 31 (Part 1), art. 3452 (July 29, 2006).

30. Sergey Ivanov, Press Conference (Mar. 28, 2006), <http://www.mil.ru/articles/article12865.shtml>.

31. Four Russian embassy personnel were kidnapped in Baghdad on June 3, 2006 from a Russian embassy vehicle. A fifth was killed during the attack on the vehicle. On June 25, a group linked to al-Qaida reported that it executed the four diplomats. *See Al-Qaida group claims Russian deaths*, UPI, June 25, 2006, *available at* <http://www.arcamax.com/cgi-bin/news/newsheadlines/s-88252-152190review=4>.

32. Most notable are DAVID LEVIN, MEZHDUNARODNOYE PRAVO I SOKHRANENIYE MIRA (INTERNATIONAL LAW AND THE PRESERVATION OF PEACE) 148 (1971); EDUARD SKAKUNOV, SAMOOBORONA V MEZHDUNARODNOM PRAVE (SELF-DEFENSE IN INTERNATIONAL LAW) 21, 57–58, 80–81 (1973). More recent references may be found in Vladimir Kotlyar, *Pravo na*

Preventivnuyu Samooboronu i Sovremennoe Mezhdunarodnoe Pravo (The Right to Preventive Self-Defense and Contemporary International Law) GOSUDARSTVO I PRAVO (STATE AND LAW), No. 10 (2005), at 76–77. See also Tuzmukhamedov, *supra* note 18, at 37–40 and Tuzmukhamedov, *Uprezhdeniye Siloy: “Karolina” i Sovremennost’* (Preemption by Force: “Caroline” and Modernity), ROSSIYA V GLOBALNOY POLITIKE (RUSSIA IN GLOBAL AFFAIRS) No. 2 (2006), at 205.

33. Daniel Webster wrote, “It will be for that Government [Her Majesty’s] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), IN 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 449 (Hunter Miller ed., 1934).

34. The letters exchanged between Webster, Fox and Ashburton and an extract from President Tyler’s message to the Congress are also available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

35. Letter from Lord Ashburton, Minister Plenipotentiary on Special Mission, to Daniel Webster, US Secretary of State (July 28, 1842), 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, *supra* note 33, at 451.

36. *Id.*

37. Interviewed by the Italian daily newspaper *Corriere Della Sera* on November 3, 2003, President Putin stated that “if the principle of preventive use of force would assert itself in international practice, in international life, then Russia shall reserve the right to act in a similar mode to protect its own national interests,” <http://www.kremlin.ru/text/appears/2003/11/54926.shtml> (last visited Sept. 30, 2006). See also W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 525 (2006).

VII

Security in the Strait of Malacca and the Regional Maritime Security Initiative: Responses to the US Proposal

Yann-huei Song*

Introduction

The Regional Maritime Security Initiative (RMSI), proposed in 2004 by Admiral Thomas B. Fargo, former commander of the US Pacific Command, is one of the American maritime security programs and initiatives designed to promote regional cooperation and improve maritime security in the East Asia and Pacific region, especially in the straits of Malacca and Singapore.¹ The main goal of RMSI is to develop a partnership of willing nations, working together under international and domestic law, to identify, monitor and intercept transnational maritime threats, in particular piracy, armed robbery and terrorist attacks at sea.² This initiative is now coordinated jointly by the US Pacific Command and the US Department of State.³

The Strait of Malacca, six hundred miles long and only one and a half miles wide at its narrowest point, is a confined stretch of water between Peninsular Malaysia and the Indonesian island of Sumatra. From an economic and strategic perspective, it is one of the most important shipping lanes in the world, the equivalent of the Suez Canal or Panama Canal. The Strait of Malacca forms the

* Research Fellow, Academia Sinica, Taiwan. Fulbright Visiting Scholar, the Asia-Pacific Research Center, Stanford University.

seaway connecting the Indian Ocean with the South China Sea and the Pacific Ocean, linking three of the world's most populous nations: India, Indonesia and China. Annually, approximately fifty thousand large vessels, and daily, an average of forty-five oil tankers, pass through the strait.⁴ Daily, about six hundred cargo vessels carrying everything from Japanese nuclear waste bound for reprocessing facilities in Europe to raw materials for China's booming economy traverse the Strait of Malacca.⁵ It is estimated that two-thirds of the world's liquefied natural gas (LNG);⁶ between one-fifth and one-quarter of the world's sea trade; half of the global oil shipments carried by sea; and over 80 percent of the oil and gas imports of China, Japan, Taiwan and South Korea come through the Strait of Malacca. The number of ships passing through the strait is projected to increase due to the rapid economic growth of the countries in the Asia-Pacific region. It has been estimated that within the next twenty years two-thirds of China's petroleum imports will flow from the Middle East, most probably through the Strait of Malacca.⁷ While two alternative waterways are available for international shipping (the Sunda Strait and the Lombok and Makassar straits through Indonesian archipelagic waters), if the Strait of Malacca was closed a detour through these alternative routes would add a significant amount of shipping time and cost.

In recent years the Strait of Malacca has increasingly become the target of piracy and armed robbery against vessels. This upsurge in the violence directed against shipping is not surprising given the high volume of transiting traffic, the geographical nature of the strait, the significant political and economic instability in the area, and the lack of resources and weak maritime law enforcement capacity of the littoral States. Since the September 11, 2001 terrorist attacks in the United States, increasing attention has been given to the threat of maritime terrorism, proliferation of weapons of mass destruction (WMD) and the security of the maritime transport sector in general. As a result of this changed strategic environment in the Strait of Malacca area, there has also been a growing conviction among the littoral States of the need to establish a burden-sharing arrangement, based on Article 43 of the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).⁸ Such an arrangement would be designed to help cover the gradually increasing cost of providing essential maritime infrastructure in the Strait of Malacca and, over the years, to keep the waters clear of pollution, safe for navigation, and free from the threat of pirate and terrorist attacks.

User States, especially China, Japan, South Korea and Taiwan, which are dependent on the strait for the smooth and efficient transit of cargo, in particular energy supplies, also raised concerns about the safety and security of their vessels and have demanded that enhanced security measures be taken by the States that border the Strait of Malacca.⁹ Other user States that are among the major maritime powers,

such as the United States, also raised maritime security concerns regarding the potential threat of transnational crimes, maritime terrorism and armed attacks against their naval and commercial vessels traversing the strait. As a result, the maritime powers began to explore possible means of becoming involved more directly in the management of security matters in the Strait of Malacca. These efforts, however, were regarded by the littoral States as an attempt to “internationalize” the safety and security of the Strait of Malacca. In response, the littoral States reiterated their positions that enhancing safety and security and managing environmental issues in the strait are primarily their responsibility.

It is against this background that, when the idea of a RMSI was first introduced in Admiral Fargo’s speech to the US Congress on March 31, 2004, Indonesia and Malaysia strongly rejected the idea of patrols by foreign powers in the Strait of Malacca. The governments of these two nations also raised the concern that a US naval presence in the strait would actually attract terrorist attacks and bolster the appeal of extremists. However, Singapore, with its economy heavily dependent on global commercial traffic through the strait, sees piracy, armed robbery and maritime terrorism as major security threats, and therefore supported the RMSI, arguing that it is an intensive and complex task to safeguard the waterways against maritime terrorism and that no single State has the resources to deal effectively with the maritime security threat in the Strait of Malacca.

In response to the serious concerns of Indonesia and Malaysia, the American security initiative was modified to delete the original proposal to deploy US forces to conduct patrols in the strait. On the other hand, due in large measure to the prospect of foreign intervention in safeguarding the security of the Strait of Malacca, Indonesia, Malaysia and Singapore agreed to carry out coordinated sea and air patrols to curb piracy and armed robbery, and to increase maritime security. The decision of the Joint War Committee (JWC) of Lloyd’s Market Association in June 2005 to declare the Strait of Malacca a “war-risk and terrorist zone” also prompted the three littoral States to take a series of unilateral, bilateral and trilateral cooperative actions to improve the security environment of the Strait of Malacca.

Malaysia, for instance, announced that its armed police will be placed on board selected tug boats and barges traversing the Strait of Malacca. In addition, an escort service will be provided for vessels carrying valuable goods in the strait. Malaysia also declared that it will begin twenty-four-hour surveillance of the strait.¹⁰ A new Malaysian Maritime Enforcement Agency (MMEA) was also established and began patrolling the Strait of Malacca in November 2005. Bilateral coordinated patrols between Malaysia and Indonesia, and between Indonesia and Singapore, have also been worked out to bring together their respective agencies involved in anti-piracy and anti-robbery activities. In July 2004, Indonesia,

Malaysia and Singapore launched a new trilateral coordinated patrols initiative (*Malsindo*) in the Strait of Malacca, which was seen as another major response of the littoral States to the increasingly challenging issue of safety and security of the strait. In addition, in August 2005, the three littoral States agreed to implement joint air patrols over the Strait of Malacca in a bid to boost security in the waterway, which has been dubbed the “Eyes in the Sky” plan. In April 2006, Indonesia, Malaysia and Singapore signed an agreement to form a Joint Coordinating Committee on the Malacca Straits Patrols (MSP) and Standard Operational Procedures on Coordinated Patrols.¹¹

The purpose of this article is to examine the development of the US-proposed RMSI and its influence on national and regional efforts being undertaken to enhance security in the Malacca strait and will focus, in particular, on the littoral States’ responses to the American security initiative. The paper first looks into the background of the introduction of the idea of RMSI by the US Pacific Command in March 2004; second, it provides an overview of the RMSI and the implementation of the initiative; third, it examines the preliminary national responses of the three States that border the Strait of Malacca to the US initiative; fourth, it summarizes the views of selected ocean law and maritime security experts on the legality, justification and political implications of the initiative; fifth, it addresses the steps taken by the littoral States unilaterally, bilaterally and multilaterally, between July 2004 and June 2006, to enhance security in the Strait of Malacca; sixth, it summarizes the important regional responses and efforts to help enhance security in the Malacca strait; seventh, it discusses the role played by existing mechanisms in the region in processes to help develop cooperative efforts to improve security in the strait; and finally, it offers the author’s observations regarding policy outcomes in terms of littoral States’ responses to the US-proposed RMSI and the challenges lying ahead for advancing maritime security in the Strait of Malacca.

Background for the Regional Maritime Security Initiative Concept

The September 11, 2001 attacks and subsequent anthrax attacks in the United States profoundly changed the Bush administration’s strategic thinking on national security. This change was reflected in the National Security Strategy of the United States of America and the National Strategy to Combat Weapons of Mass Destruction, which were released by the White House in September 2002 and December 2002, respectively.¹² This new strategic thinking is defined by (1) the way in which the United States uses force in the post-9/11 world, (2) how the United States defines defense and (3) the way the United States approaches proliferation.¹³ Under the new strategy, winning the war against terrorism and stopping

the proliferation of WMD have become priority missions of the American armed forces. In the maritime domain,¹⁴ preventing terrorist attacks and criminal or hostile acts has also emerged as one of the key US policy objectives that guide the nation's maritime security activities.

In October 2000, terrorists in a boat laden with explosives carried out a suicide bombing of the *USS Cole* (DDG 67) in the harbor at Aden, Yemen. Seventeen US sailors were killed and over thirty others were wounded. The attack, organized by Osama bin Laden's al-Qaeda terrorist organization, was carried out by suicide bombers Ibrahim al-Thawr and Abdullah al-Misawa.¹⁵ After the September 11th attacks, the United States became more concerned about potential terrorist attacks in the Strait of Malacca area, as demonstrated in late 2001 and early 2002 when US and Indian naval forces collaborated to protect American merchant shipping at the northern end of the strait.¹⁶ The US perception of the maritime security threat in Southeast Asia and the Malacca strait was further reinforced in late 2002 and 2003 by three elements: (1) increasing concerns over the association of piracy with terrorist organizations in the region; (2) US and foreign security intelligence reports indicating that US-flag vessels, both civilian and military, could be attacked by terrorist groups when sailing through the strait or anchoring at ports; and (3) the increasing number of reports of pirate and maritime terrorist attack incidents that occurred in Southeast Asia and in the Strait of Malacca.

According to the available evidence obtained by the US Central Intelligence Agency (CIA) and other Western intelligence services, terrorist groups have already considered striking at maritime targets, particularly in the Strait of Malacca. The video tapes seized from the Indonesian terrorist group Jemaah Islamiyya (JI), which included footage of Malaysian maritime police patrols, indicate that this terrorist group was observing security procedures operating in the strait. Members of JI have been trained in seaborne guerrilla tactics, such as suicide diving capabilities and ramming. A basic diving manual recovered in Kandahar in Afghanistan was seen as further evidence of a larger plan to launch maritime attacks by the al-Qaeda networks and it is well known that JI has links with al-Qaeda.¹⁷ It is believed that other terrorist groups in Southeast Asia, such as the Free Aceh Movement (also known as Gerakan Aceh Merdeka (GAM)), the Abu Sayyaf Group, the Moro Islamic Liberation Front (MILF) and the Moro National Liberation Front (MNLF), are also engaging in maritime piracy or terrorist attacks in the region. Following the arrests of several JI operatives in Singapore in December 2001, it was revealed that the terrorist group was plotting to blow up US warships docked at the Changi Naval Base in Singapore.¹⁸ Warnings about terrorist groups' plans to seize US-flag vessels in the Strait of Malacca had also been issued by US intelligence services.¹⁹

A number of reports on pirate and maritime terrorist attacks in late 2002 and 2003 also increased US concerns about possible attacks against its vessels transiting the waterways in the Strait of Malacca and Southeast Asia. In October 2002, the *MV Limburg*, a French oil tanker, was attacked by an explosive-laden boat.²⁰ The organizer of the attack was Abd al Rahman al Nashir, who was also believed to have been responsible for the attack on the *Cole*. The *Limburg* attack not only highlighted the vulnerability of cargo ships to terrorist attacks but also confirmed US concerns that it is not beyond the capabilities of terrorist groups to carry out assaults on maritime interests such as vessels and ports. In March 2003, the Indonesian chemical tanker *Dewi Madrim* was boarded by ten pirates from a speedboat in the congested southern reaches of the Strait of Malacca. The pirates were equipped with machine guns and machetes and carried VHF radios. Having disabled the tanker's communications and tied up the crew, the pirates took the helm and navigated the vessel for about an hour before departing with the master and first officer as hostages. According to a study by Aegis Defence Services, a London-based defense and security consultancy, the temporary hijacking of the *Dewi Madrim* was an attempt by terrorists to learn how to pilot a ship, and the kidnapping was aimed at acquiring expertise to help the terrorists mount a maritime attack. The *Dewi Madrim* attack was therefore considered the equivalent of the tactics of the al-Qaeda hijackers who perpetrated the September 11th attacks after going to a flight school in Florida.²¹ Singapore's defense minister, Tony Tan, also stated that the *Dewi Madrim* incident and others like it were practice runs for a terrorist attack.²² In February 2004, six al-Qaeda-linked Muslim militants of the Abu Sayyaf Group bombed *SuperFerry 14*, leaving over one hundred people dead. Philippine president Gloria Arroyo confirmed that the attack was the work of terrorists.²³ In addition to the maritime terrorist attacks, pirate attacks in the Strait of Malacca also increased from sixteen to twenty-eight in 2003 and from twenty-eight to thirty-seven in 2004.²⁴ According to the International Maritime Bureau's piracy reporting center, seventy of the 251 global reports of piratical attacks in the first nine months of 2004 occurred in the Strait of Malacca.²⁵

The US Pacific Command is the headquarters responsible for all American air, ground and maritime military forces in the Asia-Pacific region. The Strait of Malacca and Southeast Asia are within the area of responsibility of this command, the mission of which is to promote security and peaceful development in the region by deterring aggression, advancing regional security cooperation, responding to crises, and fighting to win.²⁶ Since the September 11 attacks, prosecuting and winning the global war on terrorism has become one of the command's major focus areas. In response to the increasing maritime security threat in the Strait of

Malacca and Southeast Asia, as demonstrated above, the US Pacific Command developed the concept of RMSI.

The Development and Overview of the Regional Maritime Security Initiative

On March 31, 2004, in testimony before the House Armed Services Committee regarding US Pacific Command posture, Admiral Thomas B. Fargo, its commander, stated that despite notable successes in the war on terrorism, the United States remained deeply concerned about transnational threats from terrorist organizations such as al-Qaeda, JI and the Abu Sayyaf Group in the Asia-Pacific region. The United States sensed increasing synergy between transnational threats like terrorism, illicit drugs, trafficking in humans, piracy and especially WMD proliferation. To improve international cooperation against these transnational security threats, President George Bush launched the Proliferation Security Initiative (PSI) and the State Department proposed the Malacca Straits Initiative in 2003. To help operationalize these initiatives, the US Pacific Command introduced the concept of RMSI.²⁷ During the question and answer session at the same hearings, in response to the questions raised by Congressman Rick Larsen about RMSI and its relationship to the PSI, Admiral Fargo cited the lack of information and intelligence on the transnational maritime threat. The Admiral noted that there was widespread support for RMSI and stated:

I just came back from Singapore and had a very solid conversation with the “Sings” and they’re going to help us with this. My instinct, it probably ought to start at the Strait of [Malacca] and work its way out, because the Straits of [Malacca] are fundamental to the movement of all of the energy through the region. . . . We need to know who’s moving through the sea space. We need to know the status of ships. We need participation from the vast majority of them so that we can single out and cue on those that aren’t within the law.²⁸

It was Admiral Fargo’s belief that RMSI would receive a very broad range of support from the countries in the region, including the three littoral States of the Malacca strait.²⁹

As far as the means to implement the initiative are concerned—in particular, to carry out maritime interdiction operations in the Strait of Malacca—the Admiral indicated that

We’re looking at things like high-speed vessels, putting Special Operations Forces on high-speed vessels, putting, potentially, Marines on high-speed vessels so that we can use boats that might be incorporated with these vessels to conduct effective

interdiction in . . . these sea lines of communications where terrorists are known to move about and transit throughout the region.³⁰

This proposal later became the main reason two of the littoral States of the Malacca strait—Indonesia and Malaysia—rejected the idea of RMSI. In response to the strong reactions from the littoral States, US ambassador to Indonesia Ralph L. Boyce clarified the statement in Jakarta in April 2004, saying, “Admiral Fargo never said the US was going to send its marines or special forces to the Straits of Malacca. The AFP story . . . was misleading.”³¹ The US embassy in Malaysia also made the same clarification, adding that the RMSI would be conducted within existing international laws.³² Having clarified Admiral Fargo’s proposal, the US State Department continued to call on the nations in the Asia-Pacific region to work more closely to deal with the transnational threats, in particular, terrorism, piracy and other crimes, including drug trafficking and human trafficking. US deputy assistant secretary of state for East Asia Matthew Daley, for instance, warned at the Dialogue on Security in Asia, held in Singapore in April 2004, that “Asia’s waters are prime targets for Al-Qaeda and other terrorists” and “[w]hether we are talking about acts of piracy or terrorist attacks or even transnational problems, such as trafficking of persons or drugs, the terrorist aspect is not to be underestimated.”³³ Daley also stressed that the concern over the potential maritime terrorist attacks was not simply theoretical but was going to be an essential area of multilateral cooperation in the Asia-Pacific region in the months and years to come.³⁴

In May 2004, Admiral Fargo further elaborated his idea of RMSI at the Military Operations and Law Conference held in Victoria, British Columbia, where he also emphasized the importance of conducting the initiative under existing international laws, including the laws of war and respect for national sovereignty. As he explained at the conference:

The goal of RMSI is to develop a partnership of willing regional nations with varying capabilities and capacities to identify, monitor, and intercept transnational maritime threats under existing international and domestic laws. This collective effort will empower each participating nation with the timely information and capabilities it needs to act against maritime threats in its own territorial seas. As always, each nation will have to decide for itself what response, if any, it will take in its own waters. Information sharing will also contribute to the security of international seas, creating an environment hostile to terrorism and other criminal activities. Any RMSI activity in international waters will, again, be in accordance with existing international law.³⁵

There were five elements in the RMSI proposed by Admiral Fargo. These are (1) increased situational awareness and information sharing, (2) responsive

decision-making architectures, (3) maritime interdiction capabilities, (4) littoral security and (5) interagency cooperation. He also made it clear that RMSI is not a treaty or an alliance and that the initiative will not result in a standing naval force patrolling the Pacific. Admiral Fargo added that the initiative differs from the PSI in the sense that it is not a global effort, but will focus on maritime transnational threats in the Asia-Pacific region. Moreover, RMSI is not a challenge to sovereignty, and activities undertaken under the initiative will not violate existing international and domestic laws.³⁶

In July 2004, the United States and the Philippines co-hosted the Maritime Threats Workshop held in Cebu in the Philippines. A major topic of the workshop was the US-proposed RMSI, which “emphasizes information sharing, providing cueing of emerging threats, contributing to the security of international seas, and most important, creating an environment hostile to terrorism and other criminal activities.”³⁷ It was stated that RMSI could empower each nation to take action it deems necessary to protect itself in its own waters, thereby enhancing the region’s collective security. While the participants agreed that RMSI could provide a plan of action to address the transnational maritime threats in the region, they also recommended the use of existing fora and international/regional programs that are appropriate to address RMSI objectives in order to avoid establishing additional mechanisms. The existing mechanisms include the Association of Southeast Asian Nations (ASEAN), the ASEAN Regional Forum (ARF) and the Asia-Pacific Economic Cooperation group (APEC).³⁸

In November 2004, an overview of RMSI was provided on the website of the US Pacific Command, along with links to the US Pacific Command Strategy for Regional Maritime Security and other RMSI-related documents. These documents provide a more accurate understanding of RMSI, its strategic intent and status.³⁹ The Strategy for Regional Maritime Security stated clearly in its executive summary that RMSI “is designed to deny the use of the maritime domain by those who pose a threat to the Asia-Pacific region’s maritime security, including transnational terrorists and criminals.”⁴⁰ The nations participating in this initiative will utilize a cross-discipline, interagency approach to facilitate the development of regional maritime security capacities and conduct activities to establish and maintain a secure maritime environment. Implementation of RMSI will be accomplished by coordinating activities between the United States and the participating nations in the region that support the following common elements of maritime security: (1) increased situational awareness and information sharing; (2) responsive decision-making architectures; (3) enhanced maritime interception capacity; and (4) agency, ministerial and international cooperation.⁴¹

According to the regional maritime security strategy, RMSI activities will be undertaken in the territorial waters of the participating nations and international waters of the Pacific and Indian oceans to counter “maritime threats” that include terrorism, maritime piracy, illegal trafficking (i.e., narcotics, weapons, human and illicit cargo) and other criminal activities in the maritime domain.⁴² RMSI will be implemented through a cooperative effort, emphasizing interactions with the governments, international organizations and private sectors in the region, and will be based upon existing bilateral and multilateral arrangements. The international organizations dealing with maritime security issues in the region include, but are not limited to, ASEAN, ARF, ASEAN Security Community (ASC), APEC, Council for Security Cooperation in the Asia Pacific (CSCAP), International Maritime Bureau (IMB), North Pacific Heads of Coast Guard Agencies, United Nations International Maritime Organization (IMO) and the Western Pacific Naval Symposium (WPNS).⁴³

The strategic intent of RMSI is to carry out the four common elements of maritime security mentioned earlier through cooperative efforts. Accordingly, the RMSI-participating nations will establish procedures, processes and standards to fuse information and the means to share the information; support the development of responsive decision-making architectures and regional maritime security capacity through agency, ministerial and international unity of effort; engage in appropriate fora to gain the requisite understanding of existing maritime security capacities; and develop cooperative arrangements to monitor, identify and intercept suspect vessels and transnational threats in territorial and international waters, consistent with international and domestic law. RMSI will also leverage appropriate elements of national and international resources and capabilities and will complement ongoing cooperative security activities such as bilateral and multilateral exercises, the Container Security Initiative (CSI), Counterdrug (CD) Operations, Customs-Trade Partnership Against Terrorism (C-TPAT), International Port Security Program (IPSP), International Ship and Port Facility Security (ISPS) Code, Maritime Domain Awareness (MDA), Multinational Planning Augmentation Team (MPAT), Proliferation Security Initiative (PSI), Regional Cooperation Agreement on Anti-Piracy (ReCAAP), and Secure Trade in the APEC Region (STAR).⁴⁴ Table 1 (below) illustrates security in the Asia-Pacific maritime continuum.

In December 2004, President Bush promulgated National Security Presidential Directive 41 and Homeland Security Presidential Directive 13 (NSPD-41/HSPD-13), which established US policy, guidelines and implementation actions to enhance US national interests and homeland security by protecting US maritime interests. The directives also established a Maritime Security Policy Coordinating Committee to coordinate interagency maritime security policy efforts. In recognition of the

importance of the maritime domain to US national security interests, and given the potential threat to US maritime security, the US government decided to

[D]eploy the full range of its operational assets and capabilities to prevent the Maritime Domain from being used by terrorists, criminals, and hostile States to commit acts of terrorism and criminal or other unlawful or hostile acts against the United States, its people, economy, property, territory, allies, and friends, while recognizing that maritime security policies are most effective when the strategic importance of international trade, economic cooperation, and the free flow of commerce are considered appropriately.⁴⁵

It thus became US policy “to take all necessary and appropriate actions, consistent with U.S. law, treaties and other international agreements to which the United States is a party, and customary international law as determined for the United States by the President, to enhance security and protect U.S. interests in the Maritime Domain.”⁴⁶

	PSI	MDA	CSI	RMSI	ISPS
TITLE	Proliferation Security Initiative	Maritime Domain Awareness	Container Security Initiative	Regional Maritime Security Initiative	International Ship & Port Facility Security Code
US & INTL. AGENCIES	National Security Council US Department of State US Department of Defense	US Coast Guard US Navy	US Department of Homeland Security– Customs & Border Protection (CBP)	US Department of State USPACOM	United Nations International Maritime Organization
AREA	Worldwide/Global	US & Territories	Worldwide/Global	Asia-Pacific Region	Worldwide/Global
FOCUS	Deter & disrupt WMD (& related material/delivery systems) proliferation transported on the sea, air & ground. Reduce proliferation by deterring suppliers & customers, & making proliferation more costly & difficult.	Attain effective understanding of anything associated with the global maritime environment that could impact the security, safety, economy or environment of the US.	US-bound shipping cargo container safety. Exchange program with CBP officers stationed in select ports. About 7 million containers arriving in US ports annually. 90% of global trade via cargo containers.	Partnership of willing nations enhancing capabilities & leveraging capacities through unity of effort to identify, monitor & intercept transnational maritime threats consistent with existing international & domestic laws.	Provide a standardized, consistent framework for evaluating risk & enabling governments to offset changes in threats with changes in vulnerability for ships & port facilities.

Table 1: Security in the Asia-Pacific Maritime Continuum
Source: US Pacific Command, RMSI: The Idea, The Facts⁴⁷

Accordingly, President Bush directed the secretaries of defense and homeland security to jointly lead a collaborative interagency effort to draft a recommended National Strategy for Maritime Security.⁴⁸ In concert with the development of the national strategy, the following actions were tasked: (1) Maritime Domain Awareness, (2) Global Maritime Intelligence Integration, (3) Domestic Outreach, (4) Coordination of International Efforts and International Outreach, (5) Maritime Threat Response, (6) Maritime Infrastructure Recovery, (7) Maritime Transportation System Security, and (8) Maritime Commerce Security.⁴⁹ While the term “Regional Maritime Security Initiative” was not found in the directive, it is clear that Admiral Fargo’s concept of RMSI had been incorporated into NSPD-41/HSPD-13.

In February 2005, Admiral William J. Fallon was nominated by President Bush and confirmed by the US Senate to succeed Admiral Fargo as the new Commander, US Pacific Command. Thereafter, RMSI continued to constitute an integral part of the command’s maritime security strategy. As reflected in Admiral Fallon’s remarks at the 4th Annual Shangri-La Dialogue held in Singapore in June 2005, the concept of RMSI remains very much alive. He noted that RMSI was launched by his predecessor and reiterated US Pacific Command’s concern over the maritime security threat in the Asia-Pacific region. He pointed out that because knowledge of activities in the sea space is incomplete, unseen threats can develop and therefore it is essential to develop close cooperation among nations and between maritime organizations, both State and non-governmental, in the region. In addition, with due respect for national sovereignty, Admiral Fallon suggested that organizational and operational issues should be priority items for agreement for the purpose of enhancing maritime security in the Asia-Pacific region.⁵⁰

In September 2005, the National Strategy for Maritime Security⁵¹ was issued by the White House, listing the following threats to US maritime security: (1) nation-State threats associated with terrorism and WMD attacks; (2) terrorist threats, in particular those associated with attacks by possible use of WMD and attacks at or from the sea; (3) transnational criminal and piracy threats; (4) environmental destruction; and (5) illegal seaborne immigration. The US perception of maritime terrorist threats is reflected in the following security assessment:

Terrorists can also develop effective attack capabilities relatively quickly using a variety of platforms, including explosives-laden suicide boats . . . and light aircraft; merchant and cruise ships as kinetic weapons to ram another vessel, warship, port facility, or offshore platform; commercial vessels as launch platforms for missile attacks; underwater swimmers to infiltrate ports; and unmanned underwater explosive delivery vehicles. Mines are also an effective weapon because they are low-cost, readily available, easily deployed, difficult to counter and require minimal training. Terrorists can also take advantage of a vessel’s legitimate cargo, such as chemicals, petroleum, or

liquefied natural gas, as the explosive component of an attack. Vessels can be used to transport powerful conventional explosives or WMD for detonation in a port or alongside an offshore facility.⁵²

To achieve the objectives of the National Strategy for Maritime Security, the following five strategic actions are to be taken collectively by the United States, other willing nations and international organizations: (1) enhance international cooperation, (2) maximize domain awareness, (3) embed security into commercial practices, (4) deploy layered security and (5) assure continuity of the marine transportation system.⁵³ Specifically referring to the management of security in the Strait of Malacca, it is the policy of the United States to “use the agencies and components of the Federal Government in innovative ways to improve the security of sea-lanes that pass through international straits.”⁵⁴ The United States intends to work with its regional and international partners to expand maritime security efforts. Since regional maritime security regimes are a major international component of the US national strategy, and are essential for ensuring the effective security of regional seas, the United States is willing to work closely with other governments and international and regional organizations to enhance the maritime security capabilities of other key nations by adopting the following measures:

- Offering maritime and port security assistance, training and consultation;
- Coordinating and prioritizing maritime security assistance and liaison within regions;
- Allocating economic assistance to developing nations for maritime security to enhance security and prosperity;
- Promoting implementation of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its amendment and other international agreements; and
- Expanding the International Port Security and Maritime Liaison Officer programs, and the number of agency attachés.⁵⁵

In addition to the National Strategy for Maritime Security, the relevant US departments and agencies have developed eight supporting plans to address the specific threats and challenges of the maritime environment, which include:

- The National Plan to Achieve Maritime Domain Awareness;⁵⁶
- The Global Maritime Intelligence Integration Plan;⁵⁷
- The Maritime Operational Threat Response Plan;⁵⁸
- The International Outreach and Coordination Strategy;⁵⁹
- The Maritime Infrastructure Recovery Plan;⁶⁰

- The Maritime Transportation System Security Recommendations;⁶¹
- The Maritime Commerce Security Plan;⁶² and
- The Domestic Outreach Plan.⁶³

In November 2005, the Department of State submitted the International Outreach and Coordination Strategy for the National Strategy for Maritime Security⁶⁴ to the White House. The strategy aims to advance the policies set by President Bush in the National Security Strategy,⁶⁵ the National Strategy for Homeland Security⁶⁶ and the National Strategy for Maritime Security and to help accomplish the president's vision of a fully coordinated US government effort to protect the nation's interests in the maritime domain. In order to achieve the strategic goals of the International Outreach and Coordination Strategy, the US Department of State works together with the US Pacific Command to implement RMSI. In February 2006, it was reported that the State Department has proposed a \$4.8 billion military aid budget for Fiscal Year 2007, in which \$2 million is allocated to RMSI.⁶⁷ On March 7, 2006, Admiral Fallon, in testimony before the Senate Armed Services Committee, stated that “[w]inning the war on terrorism is U.S. Pacific Command's highest priority” and that Southeast Asia remains the command's focal point in the war on terror.⁶⁸

On February 15–17, 2006, the United States held a conference in Alameda, California to discuss ways and means to help coordinate potential donor contributions in maritime security efforts in the Malacca strait. Sponsored by the US Department of State and the US Coast Guard, this meeting was attended by the US Pacific Command, like-minded countries using the strait, the International Maritime Bureau (IMB), private sector representatives and other observers. The three littoral States of the Malacca strait—Indonesia, Malaysia and Singapore—were not invited to the conference. China was invited to the conference but did not attend. Taiwan was not invited because of sensitive political reasons.

The Alameda conference was an important initiative and was held under the IMO framework. However, in comparison with the news coverage on the US-proposed RMSI back in May 2004, surprisingly no reports on the Alameda conference were reported in the media, except an item in the *Defense News* regarding India's announcement during the conference that its maritime surveillance force would jointly patrol the Strait of Malacca with the United States,⁶⁹ a very brief report on the conference at the US Department of State's Fact Sheet on Maritime Security in the East Asian and Pacific Region,⁷⁰ and the commentary on the Institute of Defence and Strategic Studies website entitled “Burden Sharing in the Straits: Not So Straightforward” by Sam Bateman.⁷¹ The latter commented that the Alameda conference appeared to pre-empt the initial task of the littoral States in identifying and prioritizing their

needs to enhance safety and security and manage environmental matters, and allocated a leading role to the user States of the Strait of Malacca. In addition, this meeting appeared to attach little significance to Article 43 of the 1982 LOS Convention⁷² that has been the key focus of the littoral States over the past five years and the cornerstone of the IMO initiative that was discussed and agreed to at the Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection held in Jakarta, Indonesia in September 2005.

Before proceeding to the discussion of the littoral States' initial responses to the US-proposed RMSI, it is important to mention briefly a fact sheet provided by the US Department of State,⁷³ mainly because the document describes the US maritime security policy, especially in the Malacca strait area. According to this fact sheet, it is the US policy to seek to develop cooperative mechanisms to enhance the safety, security and environmental protection of strategic waterways in the East Asia and Pacific region, in particular the Strait of Malacca. The United States will work with like-minded countries and those littoral States responsible for safeguarding the important strategic waterways in the region. The fact sheet further provides that it is the common goal of the United States, like-minded nations and the littoral States bordering the strategic waterways "bilaterally and multilaterally, to develop a partnership of willing nations to enhance the overall capabilities and capacities to identify, monitor, and respond to maritime threats consistent with legal authorities and frameworks."⁷⁴

Especially in the Strait of Malacca, the United States will work with global partners to ensure (1) recipient and user-State donor coordination based on the burden sharing of resources, (2) the interoperability of the partners' activities, (3) the sustainability of the joint strategies and (4) the prevention of redundancy among other maritime security efforts. Each of these four aims, as set forth in the fact sheet, must match both the priorities and needs of recipient States. The United States will work with responsible States, user States, multilateral organizations and private sector partners⁷⁵ on planning, capacity building, information sharing, International Ship and Port Facilities Security (ISPS) Code implementation, technical assistance, training and exercises, private sector outreach, maritime environmental stewardship and counterterrorism.

Littoral States' Perceptions of the Regional Maritime Security Initiative

It is clear that right before the US Pacific Command's announcement of the RMSI concept, Admiral Fargo had secured support for the initiative from the government of Singapore, as demonstrated in the question and answer portion of his testimony before the House Armed Services Committee on March 31, 2004. Admiral Fargo

stated that “I just came back from Singapore and had a very solid conversation with the [Singaporeans] and they’re going to help us with [RMSI].”⁷⁶ The Admiral expected a very broad range of support for RMSI, mainly because “[a]ll of the countries in the region are concerned about the transnational threat,”⁷⁷ which includes terrorism, proliferation and the trafficking in humans. The initial reactions from the governments of Indonesia and Malaysia to the RMSI proposal in May and June 2004 proved that Admiral Fargo’s assessment of regional support for the initiative was incorrect, especially in regard to the notion of putting US Special Operations Forces or marines on high-speed vessels to conduct maritime interdiction in the Strait of Malacca. The three littoral States’ perceptions of, and initial reactions to, RMSI are examined below.

Indonesia

Shortly after the media’s disclosure of the US plan to deploy troops in the Strait of Malacca, Indonesia’s Ministry of Foreign Affairs issued a statement on the official position of the country in its opposition to the plan, arguing that Indonesia and Malaysia, in accordance with the 1982 LOS Convention, were solely responsible for guarding the Strait of Malacca.⁷⁸ Nugroho Wisnumurti, former director general for political affairs of Indonesia’s Ministry of Foreign Affairs, pointed out that

– Fighting terrorism through regional cooperation in Southeast Asia, or any part of the globe for that matter, is something to be applauded. However, fighting terrorism in the Malacca and Singapore Straits by allowing the use of military force by any country other than the coastal states (Malaysia, Indonesia and Singapore) is another matter.⁷⁹

Indonesian Navy Chief Admiral Bernard Kent Sondakh joined the opposition, calling the idea of sending special operations troops to the Strait of Malacca under RMSI “baseless.”⁸⁰ During the Second Indonesia–United States Security Dialogue, held in Washington, DC, April 22–23, 2004, the Indonesian delegation sought clarification regarding the US policy towards the Strait of Malacca. In response, the US delegation clarified the concept of RMSI and gave assurances that the United States would respect Indonesia’s sovereignty over its waters. The US delegation further agreed to continue to consult with Indonesia and other regional nations.⁸¹

In June 2004, when attending the 3rd Asian Security Conference (known as the “Shangri-La Dialogue”) in Singapore, US defense secretary Donald H. Rumsfeld told a group of Asian reporters that RMSI was an idea in its early stage and would not threaten sovereignty. The Secretary clarified that “[a]ny implications that it would impinge in any way on the sovereign territorial waters of some countries would be inaccurate.”⁸² Admiral Walter F. Doran, the United States Pacific Fleet

commander, who accompanied Secretary Rumsfeld at the conference, also told reporters that Admiral Fargo's testimony did not imply that establishing new US bases and units or stationing elite forces in the region are part of RMSI. Admiral Doran pointed out that the main idea of the initiative was to build on normal navy-to-navy contacts and discussions to raise maritime situational awareness in the Asia-Pacific region.⁸³

Despite the clarification made by high-ranking officials of the US government, including Admiral Fargo and Defense Secretary Rumsfeld, Indonesia's concerns over the possible intervention by foreign maritime powers, in particular the United States, in the management of the Strait of Malacca remained. As reported, Indonesia was displeased with joint naval patrols conducted by the navies of India and the United States for several months in 2003.⁸⁴ The reasoning behind this displeasure was Indonesia's worries about US involvement in a broader strategy that favored a permanent Indian presence in Southeast Asia, with the endorsement of Singapore.⁸⁵ According to another analysis, while the US government repeatedly stated that RMSI was still in its early stage and was mainly concerned with sharing information, rather than with deploying US troops in the Strait of Malacca, Indonesia continued to raise its objection to the US proposal, largely because of its long-standing policy of seeking regional solutions to regional security problems, and its government's need to appease a large, anti-American nationalist and Islamist domestic political audience. In addition, Indonesia perceived that the US proposal represented a challenge to regional self-management of security issues.⁸⁶

Malaysia

The government of Malaysia, taking the same position as that of Indonesia, objected strongly to the US idea of sending troops to help patrol in the Strait of Malacca under the proposed RMSI. Yab Dato Seri and Najib Tun Razak, Malaysia's deputy prime minister and defence minister respectively, stated in early April 2004 that "[i]n principle, ensuring the security of the Straits of Malacca is the responsibility of Malaysia and Indonesia and for the present we do not propose to invite the United States to join the security operations we have mounted there."⁸⁷ The defence minister continued, "[e]ven if they [the Americans] wished to act, they should get our permission, as this touches on the question of our national sovereignty."⁸⁸ Najib Razak denied that Malaysia and Indonesia needed help from non-littoral States to police the Malacca strait which, despite periodic raids by pirates on smaller cargo vessels, was generally safe for shipping. Moreover, he pointed out that while Malaysia maintained good relations with the United States, including joint military training, and that US vessels, including warships, were free to use the strait, to launch military operations in those waters the United States

should first obtain permission from the governments of Malaysia and Indonesia.⁸⁹ Mohamed Nazri Abdul Aziz, a minister in Malaysia's Prime Minister's Department, warned that if the littoral States do not properly safeguard security in the Strait of Malacca, foreign powers may be prone to intervene in managing the security matters in the strait, which would pose a threat to Malaysia's sovereignty.⁹⁰

In June 2004, while continuing to reject the notion of the sending of US troops to the Strait of Malacca, Malaysia agreed to discuss the issue of protecting the strait from piracy and potential terrorist attacks with the United States.⁹¹ In the same month at the 3rd Shangri-La Dialogue, Malaysia again stressed its opposition to a US military presence in defending the Strait of Malacca and Southeast Asia from terrorist attacks but also agreed to the principles of sharing intelligence and blocking terrorists' financial and logistical networks. Najib Tun Razak reminded the participating defense ministers of Malaysia's concerns over the negative impact of a foreign military presence on security and political stability in the region, because it would "set us back in our ideological battle against extremism and militancy."⁹²

The government of Malaysia was aware of Singapore's strong support for the US-proposed RMSI and accused Singapore of calling on foreign powers to intervene in security matters in the Strait of Malacca. Malaysia also disagreed with Singapore's security assessment with regard to the link between pirate attacks and maritime terrorism. Malaysia did not believe that the problem of piracy in the Strait of Malacca was critical; what occurred were only minor robberies, as pointed out by Rahim Husin, Malaysia's director of the Maritime Security Policy Directorate. In addition, Malaysia claimed that its law enforcement agencies were more than capable to ensure security in the strait without intervention from anyone.⁹³

Singapore

Since the September 11 attacks, Singapore has been working closely with the United States to deal with the potential threats posed by terrorism and WMD proliferation. Similar to the actions taken by Japan, Singapore participates actively in US-led security initiatives, such as the CSI and PSI. In August 2005, Singapore hosted the multinational PSI interdiction training exercise, Deep Sabre, in the South China Sea. Singapore also signed a new framework agreement with the United States for a strategic cooperation partnership in defense and security. The agreement expands the scope of bilateral cooperation between the two nations in such areas as anti-terrorism, anti-proliferation of WMD, joint military exercises and training, policy dialogues, and defense technology.⁹⁴ Based on the close security relations between Singapore and the United States, it comes as no surprise to see Singapore expressing its strong support for the US-proposed RMSI. As stated

earlier, shortly before the announcement of RMSI, Admiral Fargo had talks with the government of Singapore and obtained its support for the initiative.⁹⁵

In the area of managing security in the Strait of Malacca, Singapore complained frequently about the lack of political will to take effective actions and weak law enforcement capacities of the other States that border the Malacca strait to counter the threat posed by transnational crimes, such as piracy and armed robberies at sea. To enhance the safety and security in the strait, Singapore has been calling upon regional States and interested extra-regional powers to put pressure on the littoral States, in particular Indonesia. Singapore's perception of the maritime security threat has been greatly reinforced by the attacks on *Cole* in 2000, *Limburg* in 2002 and *Dewi Madrim* in 2003. It has become Singapore's major worry that pirate attacks might be linked to terrorist organizations that may launch terrorist attacks in the Malacca strait area.

Singapore's reactions to the US-proposed RMSI were first reflected in the statement made by its defence minister Teo Chee Hean in April 2004 that "the task of safeguarding the regional waters against maritime terrorism was complex and no single State had the resources to deal effectively with this threat."⁹⁶ In response to this statement, Malaysia's foreign minister Datuk Seri Syed Hamid pointed out that if Singapore had concerns about security in the Strait of Malacca, it should first discuss them with the littoral States of Malaysia and Indonesia.⁹⁷ In May 2004, deputy prime minister and coordinating minister for security and defence Tony Tan Keng Yam further elaborated Singapore's concerns over the threat of maritime terrorism in Southeast Asia and the lack of security in the Strait of Malacca. Tony Tan stated that "[t]he possible nexus between piracy and maritime terrorism is probably the greatest concern to maritime security."⁹⁸ To counter the threat posed by piracy and maritime terrorism, Singapore advocates a comprehensive approach that covers three overlapping domains, namely domestic, regional and international. Domestically, each country can tighten its port security by putting in place additional or enhanced measures. Regionally, the responsibility of the littoral States for the maritime security in the region must be recognized. At the same time, the littoral States should take unified and concerted action to enhance the security of strategic waterways. Internationally, key players, such as the United Nations, IMO and other nations that have a stake in the safety and security of international waterways, must be involved to protect important sea lines of communications (SLOC) against pirate attacks and maritime terrorism.⁹⁹

At the 3rd Shangri-La Dialogue held in June 2004, Tony Tan reiterated Singapore's concern over potential maritime attacks, pointing out that a ship sunk in the right spot in the Strait of Malacca would cripple world trade. He also raised the possibility of hijacked ships being turned into "floating bombs" and crashed into

critical infrastructure such as oil refineries or ports.¹⁰⁰ It was later reported that Singapore proposed the idea that US Marines help patrol the Strait of Malacca, which further reinforced the belief of Malaysia and Indonesia that Singapore was using the terrorist threat as a tool to justify the US presence in the region.¹⁰¹

Selected Ocean Law and Maritime Security Experts' Views on RMSI

In addition to the initial reactions of the three littoral States to the US-proposed RMSI, there can also be found comments made by ocean law and maritime experts in the region on the legitimacy, implications and possible impact of the initiative, some of which are summarized below.

Malaysian Ocean Law and Maritime Security Experts

Mohd Zaki Mohd Salleh¹⁰² viewed the US concept of sending its troops to the Strait of Malacca under RMSI as a political ploy by Singapore. If the United States were allowed to patrol the strait on grounds of security, he argued, it would indirectly mean that Malaysia and Indonesia had recognized the presence of a superpower in the region. Mohd Zaki expressed the opinion that Singapore was concerned about Malaysia's efforts to modernize its armed forces, which posed a threat to Singapore's sense of superiority in the region. To maintain that feeling of superiority, Singapore needed the US military presence in the Strait of Malacca and Southeast Asia. In addition, he did not believe that the problem of piracy in the region had reached a critical stage. The main reason for the sharp increase of pirate attacks in the Strait of Malacca area was, he argued, the economic slowdown in 1997–98.¹⁰³

B.A. Hamzah¹⁰⁴ maintained that the idea of inviting the US Navy to patrol the Strait of Malacca had no legal basis. Hamzah argued that since the adoption of the 1982 LOS Convention, which introduced transit passage rights in straits used for international navigation, the littoral States' control over the Strait of Malacca has been effectively eroded, given the fact that Malaysia, Indonesia and Singapore had ratified, and were bound by the convention. However, while foreign ships and aircraft enjoy the right of transit passage through the straits, they must refrain from any threat or use of force against the sovereignty, territorial integrity and political independence of the States that border the strait. In particular, foreign ships and aircraft are prohibited from taking any military or non-military posture that can be construed by the littoral States as undermining their security. Hamzah elaborated that such posture includes naval patrols and training flights by foreign forces which are considered inconsistent with transit passage rights. Accordingly, both Malaysia and Indonesia were right in opposing the US proposal to send troops to patrol the Strait of Malacca. In short, in Hamzah's view, clearly there is no legal basis under

international law, especially the 1982 LOS Convention, for a third party to conduct enforcement action in strategic waterways, except when asked or permitted by the States bordering the strait concerned. He also rebutted the argument that the lack of effective enforcement capacity of the bordering States constitutes a justification for foreign intervention in managing security matters in the Strait of Malacca.¹⁰⁵ He said,

The idea of a maritime power putting undue pressure on the bordering countries to allow their navy to patrol the Straits of Malacca is ludicrous even if the bordering states had no adequate capabilities to undertake enforcement on their own. What is more, in this case, when both Indonesia and Malaysia have adequate military capabilities to deal effectively with the current level of maritime threats in the Straits of Malacca.¹⁰⁶

Hamzah also questioned the real intention of the United States and Singapore in introducing the idea of sending naval forces to patrol the Strait of Malacca under RMSI, as he wrote: “[a]re the US and its ally looking for a new enemy in the region using the Straits of Malacca as a pretext? Or, are we witnessing the unfolding of a hidden agenda?”¹⁰⁷

Mat Taib Yasin¹⁰⁸ offered five reasons to explain why both Malaysia and Indonesia rejected the US proposal of sending troops to help patrol the Malacca strait.¹⁰⁹ First, the two nations doubted the sincerity of the US offers. This doubt centered around the question of why US assistance would come only in the form of naval patrols since there are other ways and means to help the littoral States to enhance security in the strait. “Given that deployment of military forces is often construed as symbols of intervention and aggression . . . the Littoral States should be forgiven for harboring this doubt,” he stated.¹¹⁰ The US proposal also reminded Malaysia and Indonesia of the past history of colonialism. Second, Malaysia and Indonesia opposed the US proposal because of the problem of legality. Under existing international law, in particular the 1982 LOS Convention, “there is no legal rationale for foreign powers to patrol the Straits unless or until requested by Littoral States.”¹¹¹ The third reason was the littoral States’ fear of “loss of command and control.” As demonstrated in the past, once foreign powers are in the strait, it is difficult to persuade them to leave. Fourth, the littoral States were concerned that the United States may resort to the use of excessive force as demonstrated in its global war against terrorism. And finally, Malaysia and Indonesia were concerned about the spillover effects of geopolitical rivalry between the major powers in the Strait of Malacca, which includes the US strategy to contain China by controlling China’s access to the strait.¹¹²

American Maritime Security Expert

Mark J. Valencia¹¹³ viewed the dispute over the legitimacy of the US-proposed RMSI as a clash between the littoral States, which retain their sovereignty over the Strait of Malacca under the legal regimes of innocent passage and transit passage, and foreign maritime powers, which want passage of their naval and commercial vessels in the strait to be absolutely guaranteed. As the number of pirate attacks and the concern over the potential security threat posed by maritime terrorism in Southeast Asia, and especially in the Strait of Malacca area, continued to grow, the United States and other nations such as Japan and Australia began to advocate the right to intervene in the management of the strait. The intention to intervene was further reinforced by the worries that the littoral States—Malaysia and Indonesia—either did not have the will or capability to fulfill their responsibility to protect the strait. As a result, Singapore, the United States and other like-minded nations claim that it is the responsibility of the “international community” to intervene. However, Malaysia and Indonesia believed that the threat has been exaggerated for the purpose of justifying international intervention. To avoid unilateral and preemptive intervention led by the United States, the littoral States—Malaysia, Indonesia and Singapore—should act proactively. The only defense of the littoral States against the possibility of unilateral foreign intervention in the management of security matters in the Strait of Malacca is to agree to jointly patrol the strait and suppress piracy and the threat of terrorism there.¹¹⁴

Chinese Maritime Security Expert

Ji Guoxing¹¹⁵ pointed out that China was concerned that the US-proposed RMSI will exceed transit passage rights and encroach upon the sovereignty and sovereign rights of the littoral States, in contravention of the 1982 LOS Convention.¹¹⁶ Due to its rapid economic growth, China relies more on maritime transportation and oil imports, which makes it more important to ensure the security of SLOC. Around 60 percent of China’s oil imports come from the Middle East and must go through the Strait of Malacca. The strait has been closely linked with China’s economic and energy security. Accordingly, China is very much concerned about security in the Strait of Malacca and who is in control of the strait. Ji Guoxing pointed out that it is doubtful whether the US-proposed RMSI aims to block China’s energy channel and to contain China’s economic development. China’s policy is to support global anti-terrorism efforts, support the idea of enhancing security in the Strait of Malacca and participate in regional cooperation to guarantee SLOC security. It is also China’s hope that the United States and related nations could establish a terrorism prevention mechanism in the strait through consultative cooperation under the framework of the 1982 LOS Convention to safeguard the strait’s security.¹¹⁷

Littoral States' Responses to RMSI: July 2004 to June 2006

In response to the US-proposed anti-terrorism patrols in the Strait of Malacca under RMSI, and perceiving a foreign intervention in the management of security matters in the strait and a foreign military presence in the region to be a threat to their sovereignty, Malaysia and Indonesia began to take domestic measures and cooperate with Singapore to enhance security in the strait. In addition, they also began to seek US and other user States' involvement in their efforts to enhance security in the Malacca strait, mainly by providing training, logistic support, patrolling vessels, or technological and financial aids. International organizations, such as the IMO, and regional cooperative mechanisms such as ARF and APEC, were also called upon to provide help. The littoral States' political willingness to take more effective actions to improve security in the strait was further motivated by a decision of the Joint War Committee (JWC) of Lloyd's Market Association in June 2005, which declared the Strait of Malacca a "high-risk zone" and added it to its list of areas which are at risk to war, strikes, terrorism and related perils.¹¹⁸ The littoral States were very much concerned over the JWC decision, mainly because it could result in higher insurance premiums for the ships that transit the strait or call at littoral States' ports, which, in turn, would hurt their economy. While repeatedly claiming that the JWC decision was not justified, the littoral States also realize that unless more effective action was taken to improve safety and security in the Strait of Malacca, the strait would not be removed from the JWC "high-risk zone" list. In this section, the national responses of the three littoral States of the Malacca strait to the US-proposed RMSI from July 2004 until June 2006 are examined.

Domestic Actions Taken by Littoral States to Combat Maritime Crimes

Indonesia

To improve its capacity to handle the security problems in the Strait of Malacca, Indonesia formed Navy Control Command Centers (Puskodal) in Batam and Belawan¹¹⁹ and set up six regencies at the immediate borders of the Strait of Malacca and Strait of Singapore, namely, Rokan Hilir, Bengkalis, Siak, Palawan, Indragiri Ilir and Karimun, which are believed the most vulnerable and dangerous areas for pirate attacks.¹²⁰ The main purpose of setting up these regencies was to increase the people's welfare, alleviate poverty, and thus dissuade the local people from engaging in piratical activities. Tens of regencies along the straits of Malacca and Singapore and around the three chokepoints will be set up in the future.¹²¹ In July 2005, an Indonesian maritime policy unit was established to help fight pirates and maintain Malacca security.¹²²

In September 2005, Indonesia decided to install radars at nine locations along the Strait of Malacca to strengthen security in the area and announced that the Integrated Maritime Security System (IMSS) in the strait will soon be introduced.¹²³ Given that most of the cases involving maritime crimes in Indonesia's conventional courts often produce problematic verdicts, which do not have the required deterrent effect, the government of Indonesia considered establishing maritime courts to try criminals operating in Indonesian waters.¹²⁴ Anti-piracy and anti-terror exercises were also being held to enhance security in the Strait of Malacca. For instance, in July 2005, the Indonesian Navy launched a three-month operation, named *Gurita* (Octopus) in a bid to fight rampant pirate attacks in the strait¹²⁵ and in March 2006, an anti-terrorism drill was held in the Strait of Malacca.¹²⁶

Malaysia

The government of Malaysia has also adopted a number of domestic measures to deal with the maritime threat posed by piracy and armed robberies in the Strait of Malacca. In fact, some of these measures had been implemented before RMSI was announced in May 2004. For instance, in 2003, Malaysia erected a string of radar tracking stations along the Strait of Malacca to monitor traffic and acquired new patrol boats to combat piracy.¹²⁷ In 2004, the Royal Malaysian Navy intensified its training activities and patrols in the northern reaches of the Strait of Malacca beyond the one-fathom curve in an effort to combat piracy and maritime terrorism.¹²⁸ In April 2005, it was reported that the Malaysian Maritime Enforcement Agency (MMEA) would be formed to be responsible for patrols in the Strait of Malacca.¹²⁹ This new agency began patrolling the strait in December 2005.¹³⁰ Malaysian maritime police were also asked to increase anti-piracy operations and to help ensure the safety and security of the Strait of Malacca.¹³¹ In February 2006, Malaysia announced its plan to step up anti-piracy patrols in the Strait of Malacca by adding up to fifteen new high-speed police boats and conducting joint maritime exercises with Indonesia, Thailand and Singapore.¹³²

Singapore

When undertaking efforts to fight piracy and maritime terrorism, the government of Singapore encounters a dilemma of conflicting interests between protecting its shipping industries and stressing that maritime threats in the Strait of Malacca are real and therefore asking the littoral States to adopt more cooperative law enforcement measures to protect against pirate and maritime terrorist attacks. The basis for the JWC to declare the strait a high-risk zone was the security assessment done by its consultant, Aegis Defence Services. In August 2005, the JWC stated that the Strait of Malacca would remain on the "high-risk zone" list "until it was clear that

the measures planned by governments and other agencies in the area had been implemented and were effective.”¹³³ While taking note of shipping industry concerns over rising insurance costs, the government of Singapore has consistently emphasized the potential maritime security threat in the Strait of Malacca and asked cooperation from the other two littoral States to enhance security in the strait. A number of unilateral anti-piracy and anti-terrorism measures have also been taken by Singapore, such as deploying a fleet of remote-controlled vessels,¹³⁴ providing two Fokker planes for joint Malacca strait patrols,¹³⁵ deploying armed security teams on board selected merchant vessels entering and leaving its territorial waters,¹³⁶ and laying high-tech sonar arrays on the seabed across the Malacca strait.¹³⁷ More importantly, Singapore has been very active in pressing Malaysia and Indonesia to agree to a tripartite coordinated patrolling program in the strait and to the involvement of other ARF members and user States in the management of security matters in the Malacca strait.

In addition to the selected domestic anti-piracy and anti-terrorism measures as mentioned above, Malaysia, Indonesia and Singapore have also cooperated closely with the IMO by implementing amendments to Chapter XI-2 (Special Measures to Enhance Maritime Security) of the International Convention for the Safety of Life at Sea, in particular to the International Ships and Port Facility Security (ISPS) Code and to the Automatic Identification System (AIS).¹³⁸ Indonesia and Malaysia also held a special meeting in Jakarta in September 2005 to enhance security in the Strait of Malacca. Both joined the US Container Security Initiative, Indonesia in March 2003 and Malaysia in March 2004.

Bilateral Cooperative Programs in the Strait of Malacca

Between Littoral States

In 1992, long before the announcement of the RMSI concept by the US Pacific Command, Indonesia and Singapore agreed to establish a bilateral program to patrol the Strait of Singapore, which involved the setting up of direct communication links between the navies and the relevant agencies of the two littoral States. Coordinated patrols under the program were carried out for three months in the strait.¹³⁹ In May 2005, the navies of both Indonesia and Singapore launched Project SURPIC, which is a sea surveillance system. Under the system, the two navies can share a common real-time sea situation picture of the Singapore strait.¹⁴⁰

Similarly, bilateral cooperative efforts had also been made by Indonesia and Malaysia to help improve safety and security in the Strait of Malacca. In 1992, a Maritime Operation Planning Team was established by the two nations to coordinate their joint patrols in the strait, which are conducted four times a year and

involve maritime institutions such as customs, search and rescue, and police.¹⁴¹ Indonesia and Malaysia also carry out joint patrols in the Strait of Malacca under the agreed *Malindo* program. In November 2005, Malaysia and Singapore conducted a joint exercise, codename *Ex Malapura*, in the Malacca strait to promote security in the area, which was the seventeenth joint exercise between the two navies.¹⁴² In April 2006, Malaysia and Indonesia held another joint aerial exercise, code-named *Elang Malindo XXII*.¹⁴³

Between Littoral States and User States

Bilateral cooperative programs or agreements have also been concluded between the littoral States and user States of the Malacca strait, in particular, the United States. In July 2005, as mentioned earlier, a strategic framework agreement for a closer cooperation partnership in defense and security was signed between Singapore and the United States, in which the two nations agreed to work toward enhanced cooperation in the areas of anti-WMD, anti-terrorism, search and rescue and disaster management, intelligence exchange and defense technology.¹⁴⁴ While both Malaysia and Indonesia raised concerns over the US-Singapore Strategic Framework Agreement, in particular their perception that a strong US military presence in the region would constitute a potential threat to their sovereignty,¹⁴⁵ they are willing to improve their military relations with the United States. In 2004 and 2005, Indonesia and the United States held the second and third security dialogue respectively, in which the two countries exchanged views on a wide range of security and defense issues, including security in the Strait of Malacca.¹⁴⁶ In May 2005, joint anti-terrorism exercises between the United States and Indonesia were held at sea off Jakarta.¹⁴⁷ At the end of 2005, the United States offered to help Indonesia modernize its armed forces and provide technical assistance to support joint security operations in the Strait of Malacca by Indonesia, Malaysia and Singapore.¹⁴⁸ In January 2006, it was reported that Indonesia and the United States would re-evaluate their security cooperation following the lifting of the US arms embargo in November 2005, especially in dealing with terrorism and security in the Strait of Malacca and in Southeast Asia.¹⁴⁹ In the same month, the government of Indonesia submitted its request to the United States for technical support in the form of radar, sensors and improved patrol boat capability to secure the Strait of Malacca.¹⁵⁰ Indonesia's cooperation with the United States to fight terrorism and enhance security in the Malacca strait was also discussed during the visit of US secretary of state Condoleezza Rice to Jakarta in mid-March 2006.¹⁵¹ Later that same month, Indonesia and the United States conducted a joint exercise on small craft counterterrorism maritime interdiction techniques.¹⁵² During her visit to Indonesia in March 2006, Secretary Rice noted that maritime security is a top priority in

Southeast Asia, and that the United States is working with Indonesia and others to close the strait to drug smugglers and human traffickers, pirates and weapons proliferators.¹⁵³ \$1 million in aid was allocated to Indonesia to help that nation improve security in the Strait of Malacca, according to Admiral Fallon.¹⁵⁴ In April 2006, it was reported that the United States would soon provide Indonesia with an early warning system to support security maintenance in the Strait of Malacca. It will be installed at several points along Indonesia's territory on the waterway and on maritime patrol aircraft. In addition, the United States also promised to exchange intelligence information with the three littoral States on various matters relating to the situation and condition of the Malacca strait.¹⁵⁵ Indonesia also announced that discussions would be held with the United States at the fourth Indonesia–United States Security Dialogue in Washington on April 23–30, 2006 on issues relating to the security of the Strait of Malacca, anti-terrorism, bioterrorism and cyberterrorism, as well as the security of Southeast Asia generally.¹⁵⁶

While differences over the question of securing the Strait of Malacca and the concern about an enhanced US military presence in the strait still exist, Malaysia also moved to consider accepting help from the United States to strengthen security in the strait through improved military relations between the two nations. In May 2005, for instance, Malaysia's deputy prime minister and defence minister Najib Razak discussed security in the Malacca strait with visiting US deputy secretary of state Robert Zoellick. During the visit, the Acquisition and Cross-Servicing Agreement (ACSA) was signed, which provides a framework for cooperation in military logistic matters between the two nations.¹⁵⁷ During his visit, Deputy Secretary Zoellick stated that the United States respects the role of the littoral States as the players with the responsibility for maritime security in the strait but at the same time is exploring ways to help Malaysia and Indonesia develop their capacities to deal with piracy and other crimes in the strait.¹⁵⁸ In February 2006, Deputy Prime Minister Najib Razak and Admiral Fallon held talks in Kuala Lumpur to discuss piracy and potential terrorist threats in the Strait of Malacca and the waters of Sabah.¹⁵⁹ In early June 2006, Defense Secretary Rumsfeld urged increased ties between the militaries of the United States and Indonesia during his Jakarta visit. He also discussed with Indonesian Defense Minister Juwono Sudarsono enhancing cooperation between the two nations in the fight against terrorism and the threat of piracy in the Strait of Malacca. They also discussed how the United States could provide military equipment to Indonesia to enhance Indonesia's military capability to eradicate piracy in the Malacca strait.¹⁶⁰

In addition to the bilateral cooperation between the littoral States and the United States, cooperation has also been developed between the littoral States and other main user States of the Malacca strait, such as Japan. In March 2005, in

response to a pirate attack against a Japanese-owned tugboat in the Strait of Malacca, Japan advised the littoral States of the strait that it was ready to send patrol vessels and aircraft to combat piracy. This offer was met with objections by both Malaysia and Indonesia.¹⁶¹ In May 2005, Indonesia's navy chief of staff Admiral Slamet Soebijanto said that Indonesia welcomed any assistance from foreign nations in securing the Strait of Malacca, including from Japan, as long as it was not in the form of military force. In response, Japan sent a team to Indonesia tasked with studying what type of patrol ships Indonesia needed to deal with maritime crime in the strait.¹⁶² In June 2005, during bilateral trade talks, Japan and Indonesia agreed to strengthen their cooperation to enhance the safety of navigation in the Strait of Malacca.¹⁶³ In July of that year, Indonesia announced that four patrol boats provided by Japan would carry out patrolling missions in the Malacca strait. In addition, Japan donated US\$50 million to Jakarta to help safeguard the waterways.¹⁶⁴ It was also reported in December 2005 that Japan and the three littoral States jointly drew up electronic sea charts of the Straits of Malacca and Singapore to help prevent accidents or piracy in the areas.¹⁶⁵ In February 2006 the government of Japan pledged again to grant technical aid consisting of detectors and patrol boats to protect the Malacca strait from possible terrorist attacks. Japan's Nippon Foundation also announced its decision to donate a patrol training vessel to Malaysia as part of ongoing efforts to reduce piracy and improve maritime security in the Strait of Malacca.¹⁶⁶ In June 2006, the Japanese government announced that it would donate three patrol boats to Indonesia to help fight terrorism and piracy.¹⁶⁷ In April 2006, Malaysian and Australian naval forces conducted a five-day exercise, code-named *Mastex*, in the Malacca strait.¹⁶⁸ In May 2006, Japan and Indonesia held intensive talks on security in the Malacca strait.¹⁶⁹

Tripartite Cooperative Patrolling Programs of the Littoral States

It seems safe to point out that the most important development in terms of enhancing security in the Strait of Malacca is the establishment of routine sea and air patrols by the maritime security organizations of Indonesia, Malaysia and Singapore. As stated earlier, the main motivations for reaching the tripartite cooperative patrolling agreements among the three littoral States were the increasing demand from the user States and the international community for more effective law enforcement measures to deal with the problem of piracy and possible maritime terrorist attacks, the increasing concern of the littoral States over possible intervention of foreign powers by sending their troops to the area and the decision of Lloyd's JWC that declared the Strait of Malacca a war-risk area. In July 2004 Indonesia, Malaysia and Singapore launched a coordinated patrol program, known as the *Malsindo* Coordinated Patrol (MCP). Under the program, seven warships

from Indonesia, five from Malaysia and five from Singapore are deployed to maintain security in the Strait of Malacca. However, it should be noted that the warships of the participating nations are prohibited from carrying out patrolling activities in another participating nation's territorial waters.¹⁷⁰ In securing the Malacca strait under the MCP, control points have been set up in Belawan and Batam (Indonesia), Lumut (Malaysia) and Changi (Singapore). Another control point, Phuket (Thailand), will be set up when Thailand joins the "Eyes in the Sky" program.¹⁷¹

In addition to the tripartite coordinated sea patrol program, the three littoral States also reached agreement to begin air patrols over the Malacca strait to curb piracy and increase security in the strategic waterway under the "Eyes in the Sky" program. The initiative for multinational maritime air patrols was proposed by Malaysia's deputy prime minister and defence minister Najib Razak at the Shangri-La Dialogue held in June 2005.¹⁷² Under the "Eyes in the Sky" program, each littoral State of the Malacca strait will provide two maritime aircraft per week to patrol the strait. The aircraft will only patrol the waterway and will not be allowed to fly over the land. While the maritime patrol aircraft would be allowed to fly above another participating nation's waters in the strait, they must fly no less than three nautical miles from that country's land. It was also agreed that each patrol aircraft will have a Combined Maritime Patrol Team (CMPT) on board, consisting of a military officer from each of the participating nations. The CMPT will establish a comprehensive surface picture over the patrol area. During the initiative stage for the implementation of the maritime air patrol program, only the three littoral States and Thailand can participate. But the implementation of the second phase of the "Eyes in the Sky" program could involve participation by extra-regional nations, such as the United States, subject to the principle that the sovereignty of the littoral States must be respected.¹⁷³ Although the "Eyes in the Sky" program was launched in September 2005, it was not until April 2006 that the three littoral States signed an agreement on the formation of a joint coordinating committee on the Malacca Straits Patrols (MSP) and Standard Operational Procedures on Coordinated Patrols.¹⁷⁴ Under the agreement, cross-border hot pursuit cannot be carried out without prior arrangements between the littoral States. While Singapore and Indonesia, as well as Malaysia and Indonesia, have bilateral agreements allowing for cross-border hot pursuit, Singapore and Malaysia have no such agreement and must seek permission before entering each other's territorial waters. It was pointed out that the tripartite patrol agreement is an "open arrangement with opportunities for the international community to participate," but only with the consent of Indonesia, Malaysia and Singapore.¹⁷⁵ In June 2006, at the 5th Shangri-La Dialogue, held in Singapore, both India and Japan expressed their willingness to assist the littoral States in patrolling the Strait of Malacca.¹⁷⁶

Regional Responses and Efforts in Helping Improve Security in the Malacca Strait

Regional Maritime Security Discussion in the Shangri-La Dialogue

Maritime security in the Strait of Malacca has become one of the important issues discussed at the Asian Security Conference, organized by the International Institute for Strategic Studies and dubbed the “Shangri-La Dialogue.” At the 3rd Shangri-La Dialogue, held in Singapore in June 2004, the US-proposed RMSI and the concept of sending American troops to help patrol the Strait of Malacca were heatedly discussed. Malaysia opposed strongly an enhanced US military presence in defending the strait and Southeast Asia from terrorists but agreed to the principles of shared intelligence and blocking terrorists’ financial and logistical networks. US defense secretary Donald Rumsfeld, in his speech at the same meeting, described the global war on terrorism as a battle against ideological extremism and stressed the need to cooperate and share intelligence to fight terrorism effectively. At the same time, he sought to ease fears among the Southeast Asian nations, particularly Malaysia and Indonesia, that RMSI might encroach on their sovereignty. The secretary clarified that the initiative was still in its infancy and that “[a]ny implications that it would impinge in any way on the territorial waters of some countries would be inaccurate.”¹⁷⁷

The American-proposed RMSI and the possible involvement of foreign powers in the management of security in the Strait of Malacca were continuously discussed at the 4th Shangri-La Dialogue in June 2005. At the conference, the participating defense ministers agreed that regional maritime security, particularly in the Strait of Malacca, was a matter of common concern in the region. A consensus was reached based on three broad principles: (1) the littoral States must shoulder the primary responsibility for the security of regional waterways, (2) the user States and the international community have a significant role to play and (3) new cooperative measures should be forged in a manner that was respectful of sovereignty and consistent with international law. Nations in the region recognized the need to enhance practical forms of maritime security cooperation in accordance with these principles.¹⁷⁸ In June 2006, the participating defense ministers at the 5th Shangri-La Dialogue discussed ways to advance maritime security cooperation. However, the discussions were strictly off the record.¹⁷⁹ It seems clear that both the littoral States and user States (particularly the United States) of the Malacca strait are adopting an approach of closed door consultations and collaboration to enhance maritime security in the Strait of Malacca.

Tripartite Ministerial Meeting of the Littoral States on the Malacca and Singapore Straits

In August 2005, ministers of foreign affairs of the three littoral States met in Batam, Indonesia to discuss matters relating to the safety of navigation, maritime security and environmental protection in the straits of Malacca and Singapore.¹⁸⁰ A Joint Statement was issued after the meeting, in which the three nations reaffirmed their sovereignty and sovereign rights over the Malacca and Singapore straits, which are defined under the 1982 LOS Convention as straits used for international navigation. The ministers stressed that the main responsibility for the safety, security and environmental protection in the straits lies with the littoral States. The ministers emphasized that measures undertaken in the straits in the future should be in accordance with international law, including the 1982 LOS Convention. It is based on this understanding that the three littoral States acknowledged the interest of user States and relevant international agencies and the role they could play in respect to the straits. Moreover, in recognition of the importance of engaging the States bordering the funnels leading to the Malacca and Singapore straits and the major users of the straits, the three littoral States supported continuing discussion on the overall subject of maritime security in the Southeast Asia region within the framework of ASEAN and ARF. They also acknowledged the good work carried out by the Tripartite Technical Experts Group (TTEG) on Safety of Navigation in the straits of Malacca and Singapore and recognized the efforts of the Revolving Fund Committee (RFC) in dealing with issues of environmental protection in the straits.¹⁸¹

The ministers recognized the importance of the Tripartite Ministerial Meeting on the straits of Malacca and Singapore in providing the overall framework for co-operation among them and supported the convening of the chiefs of defence forces of Malaysia, Indonesia, Singapore and Thailand Informal Meeting in Kuala Lumpur on August 1–2, 2005. More importantly, the ministers agreed to address the issue of maritime security comprehensively, which includes trans-boundary crimes such as piracy, armed robbery and terrorism. They also perceived the need to address the issue of trafficking in persons, smuggling of people and weapons, and other trans-boundary crimes through appropriate mechanisms. In recognition of the interest of others in maintaining the safety of navigation, maritime security and environmental protection in the straits, the ministers welcomed the assistance of the user States, relevant international agencies and the shipping community in the areas of capacity building, training and technology transfer, and other forms of assistance, provided that the main responsibility of the littoral States in managing the straits is respected and that the assistance is offered in accordance with the 1982 LOS Convention. The ministers expressed their displeasure with the decision of the Joint War Committee of Lloyd's Market Association that declared

the straits of Malacca and Singapore a high-risk zone for piracy and terrorism without consulting with the littoral States and taking into account the existing anti-piracy and anti-terrorism measures undertaken by them. Finally, the ministers welcomed a special meeting on enhancing safety, security and environmental protection in the Malacca and Singapore straits to be held in Jakarta in September 2005.¹⁸²

IMO Jakarta Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection

Due to a genuine concern over possible terrorist attacks in the Strait of Malacca, the IMO Council decided in November 2004 to convene a high-level conference to consider ways and means of enhancing safety, security and environmental protection in the straits.¹⁸³ Accordingly, the IMO Jakarta Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection was held in September 2005. At the conference, Mr. Efthimios Mitropoulos, secretary-general of the IMO, pointed out in his opening remarks that

[w]ith regard to the question of security versus sovereignty (or vice versa), while I can understand and fully respect the sensitivity of any State over the issue, I also believe that, whilst States have the right of non-interference in their internal affairs, they also have concurrent responsibilities towards their own people, the international community and their international engagements. Whatever the answer to this, there can be no excuse for inactivity, whether the danger is clear and present or perceived as a future possibility.¹⁸⁴

Accordingly, the secretary-general called on the three littoral States bordering the straits of Malacca and Singapore, user States of the straits, industry and all other stakeholders to work together to produce an outcome conducive to building confidence in any efforts undertaken jointly to enhance safety, security and environmental protection in the straits. The secretary-general also made it clear that any action undertaken in the future should be based on the consent, support and cooperation of the littoral States concerned, which should be invited to play a principal role in all developments. In addition, any action undertaken must be consistent with international law, including the relevant provisions of the 1982 LOS Convention.¹⁸⁵ The meeting produced the Jakarta Statement,

which emphasizes the need to balance the interest of the littoral States and the user States while respecting the littoral States' sovereignty, and to establish a mechanism to facilitate cooperation between them to discuss issues relating to the safety, security and environmental protection of the Straits of Malacca and Singapore, including exploring possible options for burden sharing.¹⁸⁶

For the purpose of enhancing the safety, security and environmental protection of the Malacca and Singapore straits, the thirty-four nations participating in the meeting agreed

- that the work of the Tripartite Technical Experts Group (TTEG) on Safety of Navigation in enhancing the safety of navigation and in protecting the marine environment in the Straits, including the efforts of the TTEG in relation to the implementation of Article 43 of the 1982 LOS Convention in the Straits, should continue to be supported and encouraged;
- that a mechanism be established by the three littoral States to meet, on a regular basis, with user States, the shipping industry and others with an interest in safe navigation through the Straits, to discuss issues relating to the safety, security and environmental protection of the Straits, as well as to facilitate cooperation in keeping the Straits safe and open to navigation, including exploring the possible options for burden sharing, and to keep the IMO informed, as appropriate, of the outcome of such meetings;
- that efforts should be made through the three littoral States to establish and enhance mechanisms for information exchange within and between States, building, where possible, on existing arrangements, such as TTEG mechanisms, so as to enhance maritime domain awareness in the Straits and thus contribute to the enhancement of co-operative measures in the areas of safety, security and environmental protection; and
- to promote, build upon and expand co-operative and operational arrangements of the three littoral States, including the Tripartite Technical Expert Group on Maritime Security, coordinated maritime patrols in the Straits through, *inter alia*, maritime security training programs and other forms of cooperation, such as maritime exercises, with a view to further strengthening capacity building in the littoral States to address security threats to shipping.¹⁸⁷

The IMO has also been invited to consider, in consultation with the littoral States, convening a series of follow-on meetings for the littoral States to identify and prioritize their needs, and for user States to identify possible assistance to respond to those needs, which may include information exchange, capacity building, training and technical support, with a view to promote and coordinate cooperative measures.¹⁸⁸ A Memorandum of Understanding (MOU) by and among the governments of the three littoral States and IMO for the implementation of a regional Marine Electronic Highway (MEH) demonstration project in the straits of Malacca and Singapore (MEH MOU) and a Memorandum on Arrangements by and among the three littoral States, IMO, International Hydrographic Organization (IHO), International Association of Independent Tanker

Owners (INTERTANKO) and International Chamber of Shipping (ICS) to implement specific activities of Article 4 of the MEH MOU were signed.¹⁸⁹ Also at the meeting, China, South Korea and Norway were encouraged to join Japan in making financial contributions to the Malacca Straits Council. Over the past thirty-five years or so, the Nippon Foundation of Japan had contributed more than US\$100 million to the council.¹⁹⁰

Tokyo Ministerial Conference on International Transport Security

In January 2006, the Ministerial Conference on International Transport Security was held in Tokyo, attended by the transport ministers of the G-8 members and six Asian nations, namely, Australia, China, Indonesia, Malaysia, Singapore and South Korea. The purpose of this conference was to discuss international transport security issues. A ministerial declaration and three ministerial statements on security in the international maritime transport sector, aviation security and land transport security were adopted by the conference. The Ministerial Statement on Security in the International Maritime Transport Sector stressed the importance of ensuring continued compliance with the provisions of Chapter XI-2 of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) and the ISPS Code, which were adopted in December 2002 and entered into force in July 2004.¹⁹¹

The participants in the conference welcomed the adoption of the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), and the 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. Among the unlawful acts covered by the 1988 SUA Convention in Article 3 are the seizure of ships by force, acts of violence against persons on board ships and the placing of devices on board a ship which are likely to destroy or damage it.¹⁹² In addition, the IMO was invited by the transport ministers

[t]o consider, in cooperation with WCO [World Customs Organization], the development and adoption, as necessary, of appropriate measures to enhance the security of the maritime transport of containers in the international supply chain, while respecting efficiency and international harmonization;

to undertake a study and make, as necessary, recommendations to enhance the security of ships other than those already covered by SOLAS chapter XI-2 and the ISPS Code, in an effort to protect them from becoming targets of acts of terrorism, piracy, or armed robbery and to prevent them from being exploited or used as means for committing such acts.¹⁹³

In May 2006, the IMO announced that parties to the SOLAS Convention had given initial acceptance to new security measures, which require ships to be tracked by satellite to fight terrorism and to prevent the introduction of WMD into the supply chain. Under the new Long-Range Identification and Tracking (LRIT) regulation, which is expected to become effective in January 2008, merchant ships will be required to transmit information about their identity, location and date and time of their position through satellite-based technology.¹⁹⁴ The new regulation on LRIT is included in the 1974 SOLAS Convention's Chapter V on Safety of Navigation, through which LRIT is introduced as a mandatory requirement for passenger ships, including high-speed craft and cargo ships of three-hundred gross tonnage and upwards, as well as mobile offshore drilling units on international voyages.¹⁹⁵

The Plan to Establish the ReCAAP Information Sharing Center

To help enhance safety and security in the Strait of Malacca, Japan launched an initiative in 2001, aiming to set up an anti-piracy cooperative framework among ASEAN countries, China, Japan, South Korea, India, Sri Lanka and Bangladesh. As a result, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP) was concluded in Tokyo in November 2004.¹⁹⁶ The agreement was opened for signature by Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, South Korea, Sri Lanka, Thailand and Vietnam, and enters into force ninety days after the date on which the tenth instrument of notification by a State mentioned above, indicating the completion of its domestic requirements, is submitted to the government of Singapore, the depository of the agreement.¹⁹⁷ As of June 2006, twelve nations¹⁹⁸ had signed, and with the exception of Brunei, had ratified the ReCAAP agreement, which entered into force on September 4, 2006.¹⁹⁹

A key pillar of the ReCAAP is the Information Sharing Center (ISC), which will be established in accordance with Part II of the agreement. The ISC, located in Singapore, is an international organization with major functions of facilitating communication and information exchanges between the member nations and improving the quality of statistics and reports on piracy and armed robbery against ships in the region. It was reported that one of the major reasons for the failure of Malaysia and Indonesia to sign the agreement to date was their displeasure with the decision to set up the ISC in Singapore. However, it should be noted that it was mentioned in the Batam Agreement that Malaysia and Indonesia "take note of" the ISC, and agreed to cooperate with the center.²⁰⁰

The Role of Existing Regional Mechanisms Promoting Maritime Security Cooperation

ASEAN and ARF

Cooperative measures to deal with the problem of piracy and maritime security threats among member States of the ASEAN²⁰¹ and participating nations in the ASEAN Regional Forum (ARF)²⁰² had been sought long before the announcement of RMSI by the US Pacific Command in May of 2004. As early as November 2001 ASEAN adopted a declaration on joint action to counter terrorism.²⁰³ In May 2002 a special ASEAN ministerial meeting on terrorism was held in Kuala Lumpur in which a joint communiqué on terrorism and the Work Program to Implement the ASEAN Action Plan to Combat Transnational Crimes were adopted.²⁰⁴ In August 2002, the United States and ASEAN, and in January 2003 the European Union and ASEAN, issued joint declarations of cooperation to combat international terrorism.²⁰⁵ All member States of ASEAN, including the three littoral States of the Strait of Malacca, were called upon to solidify governmental efforts in areas of information exchange, training, legislation, law enforcement, institution building and extra-regional cooperation. In December 2003, the ASEAN-Japan Seminar on Maritime Security and Combating Piracy was held in Tokyo. This was followed by another ASEAN-US Workshop on Enhancing Maritime Anti-piracy and Counter-terrorism Cooperation in the ASEAN Region held in Manila in April 2004.²⁰⁶

On May 9, 2006, the first ASEAN defense ministers meeting was held in Kuala Lumpur, at which the issues of human security and transnational crimes such as terrorism, piracy, trafficking, smuggling and cooperation for disaster relief were discussed. To deal with these issues, considered as ASEAN's immediate security challenges, the ministers agreed

- to promote regional peace and stability through dialogue and cooperation in defense and security;
- to give guidance to existing senior defense and military officials' dialogue and cooperation in the field of defense and security within ASEAN and with dialogue partners;
- to promote mutual trust and confidence through greater understanding of defense policies and threat perceptions, security challenges as well as enhancement of transparency and openness; and
- to contribute to the establishment of the ASEAN Security Community as stipulated in the Bali Concord II and to promote the implementation of the Vientiane Action Programme.²⁰⁷

As far as efforts undertaken by the participating nations of ARF are concerned, in June 2003 the Statement on Cooperation Against Piracy and Other Threats to Maritime Safety was adopted at the tenth ARF meeting.²⁰⁸ In the statement, the participating States and organizations recognized that “[p]iracy and armed robbery against ships and the potential for terrorist attacks on vulnerable sea shipping threaten the growth of the Asia-Pacific region, and disrupt the stability of global commerce, particularly as these have become tools of transnational organized crime.”²⁰⁹ They also recognized that “[m]aritime security is an indispensable and fundamental condition for the welfare and economic security of the ARF region” and that “[e]nsuring this security is in the direct interest of all countries, and in particular the ARF countries.”²¹⁰ They promised to achieve effective implementation of relevant international maritime instruments that aim to enhance the safety and security of shipping and port operations. The relevant instruments include the 1982 LOS Convention, the 1988 SUA and its Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, the 1974 SOLAS Convention and the relevant amendments to that convention, and the ISPS Code. ARF member nations are encouraged to become parties to the relevant international maritime conventions, if they had not yet done so.²¹¹ At the 11th ARF meeting, held in July 2004, the participating ministers affirmed that “terrorism, irrespective of its origins, motivations or objectives, constitutes a threat to all peoples and countries, and to the common interest in ensuring peace, stability, security and economic prosperity in the region and beyond.”²¹² They also adopted the ARF Statement on Strengthening Transport Security against International Terrorism, which expressed the determination of the ARF participants to take concrete and cooperative measures in safeguarding their means of transportation from terrorist threats.²¹³

In September 2004 the ARF Workshop on Maritime Security was held in Kuala Lumpur, Malaysia. During the discussion, the participants identified piracy, transnational organized crimes (such as smuggling) and terrorist activities as major threats to maritime security.²¹⁴ They concurred that there was no single nation that could handle maritime security alone and therefore cooperation, based on international law, is a must to manage maritime security effectively. In the context of the Malacca strait, the participants welcomed the coordinated sea patrols among Indonesia, Malaysia and Singapore, and other bilateral cooperation with India, noting that this was in line with the primary responsibility of the three littoral States of the straits of Malacca and Singapore. They also noted that the proposed Maritime Electronic Highway to be applied in the straits could enhance the transparency of navigation and overall traffic control and also provide the basis for intensive monitoring of the real-time navigational situation.²¹⁵ During the discussion on the way

to enhance cooperation on maritime security, the participants recognized that collective effort is vital to address maritime security threats. However, the collective effort should be undertaken on the basis of mutual respect for sovereignty, territorial integrity and in accordance with the UN Charter and other recognized international law. The use of bilateral and regional agreements was believed to be a useful method to enhance maritime security. It was also pointed out that there is need for comprehensive action, including enhancing cooperation on fighting piracy and armed robbery in the region between ARF participants' shipping and international organizations. The meeting was divided into three breakout sessions to further discuss the issue of maritime security. Breakout Session I (Managing Maritime Challenges and Threats) highlighted the need to establish intergovernmental agreements, such as standard operating procedures, and to develop a regional contingency plan where and when possible and appropriate.²¹⁶ Breakout Session III (Enhancing Cooperation on Maritime Security) identified four areas for enhancing cooperation on maritime security, namely, cooperative frameworks; common understanding of threats; information exchange mechanisms, policies and procedures; and national capacities.²¹⁷

In March 2005 Singapore and the United States co-hosted a meeting on an ARF Confidence Building Measure (CBM) on Regional Cooperation in Maritime Security in Singapore. In his speech at the meeting, Singapore's Defence Minister Teo Chee Hean urged that "[i]t would be useful for the ARF to move beyond dialogue on maritime security and work towards conducting an ARF maritime security exercise in the near future."²¹⁸ During the discussion at the meeting, some participants suggested that maritime security cooperation in the region should be formulated in accordance with the following three broad principles: (1) the primary responsibility for the safety and security of key waterways like the Malacca and Singapore straits should lay with the littoral States; (2) due to the multiplicity of stakeholders, and the complexity of the task at hand, there should be a role for all stakeholders, including interested nations, international organizations like the IMO, the shipping community and even multinational organizations; and (3) the cooperative effort should proceed on the basis of consultation and in accordance with international law.²¹⁹ Meeting participants agreed that ARF should play an important role in forging regional cooperation in maritime security, given that its wide membership encompasses the key stakeholders in regional maritime security.²²⁰ In July 2005, at the 12th ARF meeting, the participating ministers welcomed ARF's sustained efforts in promoting maritime safety and security and noted the following four areas for future cooperation: multilateral cooperation, operational solutions to maritime safety and security, shipping and port security, and application of technology for maritime safety and security.²²¹ They also adopted the ARF Statement

on Information Sharing and Intelligence Exchange and Document Integrity and Security in Enhancing Cooperation to Combat Terrorism and Other Transnational Crimes.²²² The establishment of a Regional Marine Training Centre had also been discussed at the ARF workshops and the ARF Senior Officers Meeting.²²³

Council for Security Cooperation in the Asia Pacific

The Council for Security Cooperation in the Asia Pacific (CSCAP) was established at a meeting in Kuala Lumpur in June 1993.²²⁴ The CSCAP Charter was adopted in December 1993 and was subsequently amended in August 1995.²²⁵ The purpose of setting up the CSCAP was to provide a structured process for regional confidence building and security cooperation among nations and territories in the Asia-Pacific region. Working groups are the primary mechanism for CSCAP activity. Four working groups were established in 1993–94. These were concerned with (1) maritime cooperation, (2) the enhancement of security cooperation in the North Pacific/Northeast Asia, (3) confidence- and security-building measures, and (4) cooperative and comprehensive security. In December 2004, a restructuring of the CSCAP working groups was undertaken to better reflect changes taking place in the strategic environment in the region. Consequently, the four CSCAP working groups are no longer active. Instead, six study groups were established: (1) Capacity-building for Maritime Security Cooperation in the Asia Pacific, (2) Countering the Proliferation of WMD in the Asia Pacific, (3) Future Prospects for Multilateral Security Frameworks in Northeast Asia, (4) Human Trafficking, (5) Regional Peacekeeping and Peacebuilding, and (6) Enhancing the Effectiveness of the Campaign Against International Terrorism with Specific Reference to the Asia Pacific Region. These study groups were to complete their functions in December 2006. CSCAP held general meetings before 2003 on a regular basis in accordance with its charter. In December 2002, it was decided to change the term “General Meeting” to “General Conference.” The first CSCAP General Conference was held in December 2003, but was referred to as the 4th CSCAP General Conference. The 5th CSCAP General Conference was held in December 2005.

A number of non-binding documents had previously been adopted at different CSCAP working group meetings to address the issues concerning maritime safety and shipping security before the September 11th terrorist attacks in the United States.²²⁶ CSCAP Memorandum No. 1, for example, encourages CSCAP members to undertake “[c]ooperative efforts to ensure the security of sea-lanes and sea lines of communication, with the enhancement of capabilities and maritime surveillance, safety, and search rescue operations.”²²⁷ Paragraph 3 of CSCAP Memorandum No. 4 encourages member nations to become parties to the 1982 LOS Convention and other relevant international instruments, recognizing that this will

contribute to the strengthening of peace, security, cooperation, sustainable development and friendly relations in the Asia-Pacific region. Paragraph 15 of the same Memorandum encourages CSCAP member nations to consult with regard to the ratification, implementation and participation in relevant international conventions and instruments concerning maritime safety. CSCAP Memorandum No. 5 urges member nations to adopt measures that would promote law and order at sea and reduce the incidence of maritime crime, which includes piracy and maritime terrorism.

Since the September 11th terrorist attacks, CSCAP Memorandums No. 6 and No. 7 were adopted in December 2002 and July 2003 respectively,²²⁸ and a "Report on International Terrorism" was issued in March 2002 after the CSCAP Study Group Meeting held in Kuala Lumpur, Malaysia in February 2002. CSCAP Memorandum No. 7 recognizes the importance of the concept of human security and encourages CSCAP member nations to, *inter alia*, endorse and implement relevant UN conventions and protocols, and supporting regional agreements, against terrorism and transnational crimes. The Report on International Terrorism identifies the elements of a comprehensive strategy to combat terrorism in the Asia-Pacific region. It urges CSCAP working groups to coordinate their research agendas in order to advance collective efforts in combating international terrorism. CSCAP member nations are encouraged to ratify the various UN conventions in relation to transnational crimes and related issues, adopt the UN resolution on terrorism and implement international and regional resolutions on transnational crimes and terrorism. In addition, it is stated in the report that the CSCAP Working Group on Maritime Cooperation will continue to examine the following issues: (1) the vulnerability of naval and commercial shipping, offshore platforms, ports and harbors and coastal settlements to terrorist attack; (2) the threat of maritime terrorism generally, including the use of ships as vehicles for conducting terrorist attacks; and (3) the potential for reducing vulnerabilities and countering the threat from maritime terrorist attacks.²²⁹

At the 5th CSCAP General Conference, emerging security challenges in the Asia-Pacific region were widely discussed, which included terrorism, human trafficking, the development of WMD, maritime security threats, natural disasters and the recent threat of infectious diseases in the region. Maritime security is one of the seven topics chosen to be discussed at the conference. In addition, one of the special speeches delivered at the meeting was on the Indonesian perspective of security in the Strait of Malacca. During the discussion, there were common concerns among Indonesia and other States which are also stakeholders in the security of the Strait of Malacca, which included the safety of navigation, the protection of the marine environment, the need to cooperate on search and rescue, contingency

plans against pollution, elimination of piracy and armed robberies, and preventing maritime terrorism. Based on experience over the last three decades, it was the Indonesian view that

- the problems of the Straits of Malacca and Singapore could be solved through practical/technical mechanisms and cooperation;
- cost and burden sharing in promoting safety and security of navigation are possible with the cooperation of Japan, and are increasingly necessary and essential;
- user States should voluntarily cooperate with the coastal nations to promote the safety of navigation and to protect the marine environment in the straits, as well as in law enforcement activities;
- what is needed now is a more authoritative and permanent institution to follow up on previous measures; and
- while cooperation and assistance from user States are needed and required under the 1982 LOS Convention, there are certain situations with which Indonesia would not be comfortable, such as the stationing or hiring of foreign navies or marines, arming commercial vessels with offensive weapons, and joint patrols of foreign navies in the straits.²³⁰

During discussion after the speech, the debate about the relationship between piracy and terrorism was raised. There was also a discussion on sovereignty, especially linking issues such as the resistance towards foreign navies, and also relations with user States.²³¹

APEC

In October 2001, APEC leaders meeting in Shanghai signed a statement on counterterrorism in which they pledged to cooperate fully, through close communication and cooperation among economic policy and financial authorities, to ensure that international terrorism does not disrupt economies and markets.²³² In October 2002, APEC leaders in Los Cabos, Mexico issued a Statement on Recent Acts of Terrorism in APEC Members Economies, in which they condemned terrorist acts in the APEC region, including those that occurred in Bali, in the Philippines and in Moscow earlier that month. They also encouraged joint efforts of APEC economies in mitigating the adverse impact of terrorist attacks in the affected economies and called for strengthened international cooperation to support efforts to eliminate terrorism and restore confidence in the region.²³³

In the Statement on Fighting Terrorism and Promoting Growth, adopted on October 26, 2002, APEC leaders declared their intention to work together to secure

the flow of goods and people through measures to, *inter alia*, promote ship and port security plans, install automatic identification systems on certain ships, and enhance cooperation on fighting piracy in the region between APEC fora and organizations such as the International Maritime Bureau Piracy Reporting Center and the IMO. The Secure Trade in the APEC Region (STAR) program aims to increase container and port security and to develop mechanisms to track shipments more effectively throughout the supply chain. In addition, APEC countries are asked to ratify the International Convention for the Suppression of the Financing of Terrorism, and to implement quickly and decisively all measures needed to prevent terrorists and their supporters from accessing the international financial system, as called for in UN Security Council Resolutions 1373 and 1390.²³⁴ At the APEC STAR III Conference,²³⁵ held in Incheon, Korea, February 25–26, 2005, Maritime Security Panel 3 discussions explored possible means of cooperation among APEC economies and relevant international organizations in protecting key APEC sea lanes such as the straits of Malacca and Singapore from terrorist attacks and acts of piracy, and provided suggestions in relation to trade implications from an APEC-specific perspective. It was concluded that

- APEC should provide proactive law enforcement support in the search for a long-term solution to deal with maritime security,
- various levels of cooperation are required,
- APEC economies should endeavor to share information and intelligence, and
- an “Assistance Fund” that brings all stakeholders together would be helpful.²³⁶

The Western Pacific Naval Symposium and the Five Power Defence Arrangement

The basic structure of the Western Pacific Naval Symposium (WPNS)²³⁷ and the Five Power Defence Arrangement (FPDA),²³⁸ with their traditional focus on military security, precluded dealing with non-conventional security threats, such as piracy and maritime terrorism. However, in response to the changing regional maritime security environment, both WPNS and FPDA felt the need to reconsider the focus of some of their activities. In June 2004, Malaysia’s deputy prime minister Najib Razak stated that for the FPDA to stay relevant, it has to be “reconfigured” to deal with new threats in the form of terrorism. Australian defence minister Robert Hill also agreed that the FPDA should extend the scope of its activities to include counterterrorism training.²³⁹ At the 3rd Shangri-La Dialogue, held in Singapore in June 2004, the need to expand beyond traditional territorial threats to deal with

non-conventional security threats such as maritime terrorism was recognized. It was believed that maritime security exercises could soon be commonplace among the FPDA armed forces.²⁴⁰ As a result, in September 2005 the five powers held a joint naval exercise in the waters off Malaysia and Singapore that was designed to tackle terrorism rather than wage conventional war. The exercise reflected the growing concerns in Southeast Asia and, in particular, the Strait of Malacca over the problem of piracy and terrorist attacks.²⁴¹ In March 2006 it was proposed that Australia, Britain and New Zealand, the three non-littoral member States of the FPDA, be invited to join the “Eyes in the Sky” program as long as the sovereignty of the littoral States of the Malacca strait is respected.²⁴²

The WPNS is also slowly adapting to the new maritime security environment in the Asia-Pacific region, in particular dealing with the threat of piracy, sea robbery and maritime terrorist attack. To adjust its focus of activities, the WPNS may need to consider how the maritime security environment is changing and how to engage with coast guards so that regional maritime security issues can be effectively addressed.²⁴³ More importantly, the WPNS might be selected by the US Pacific Command as an alternative regional forum to discuss maritime security issues.²⁴⁴ Possible adjustments were to be addressed by the WPNS in WPNS Workshop 2006 and in the 10th WPNS to be held in Hawaii June 25–29 and October 29 to November 2, 2006, respectively.

Positive Results from Littoral States’ Responses to the US-Proposed RMSI

Within such a short period of time, about three years since May 2004 until today, security in the Strait of Malacca has been improved significantly mainly because of the cooperative efforts undertaken by the littoral States in response to the US-proposed RMSI and the likelihood of American unilateral deployment of its forces to help patrol the strait, and also in response to the decision by the British-based Joint War Committee of Lloyd’s Market Association to put the strait on its list of war-risk areas in June 2005. According to the figures released by the IMB in its 2005 Annual Report on Piracy Against Ships, the number of pirate attacks in the Malacca strait dropped from thirty-eight in 2004 to only twelve attacks in 2005.²⁴⁵ There were no reported pirate attacks in the Strait of Malacca from January 1 to March 31, 2006, compared with eight in 2004 and four in 2005.²⁴⁶ “Action by law enforcement agencies, notably in Indonesia and the Malacca strait, has continued to be effective” and “Indonesia in particular, has increased its efforts to defeat piracy by way of a show of force in known (pirate) hotspots,” said the IMB in April 2006.²⁴⁷

In addition to the *Malsindo* joint sea patrols and the “Eyes in the Sky” joint air patrols, launched by Indonesia, Malaysia and Singapore in July 2004 and in September

2005, respectively, a number of domestic anti-piracy and anti-terrorism measures and bilateral cooperative programs have also been developed to safeguard the Strait of Malacca. New national organizations or units such as Malaysia's Maritime Enforcement Agency (MMEA) and Singapore's Accompanying Sea Security Team (ASSeT) were established to be responsible for maritime security matters. The ReCAAP Information Network System was launched in April 2006 and the ReCAAP Information Sharing Centre was to be established after the entrance into force of the ReCAAP Agreement. Moreover, bilateral cooperation between the littoral States and user States, in particular, the United States, Japan and India, has been strengthened to help improve maritime security in the Strait of Malacca and in Southeast Asia. The littoral States, especially Indonesia, have received the offer by user States of technical aids, patrol training and equipment. It is expected that the littoral States will receive more financial and technical assistance from the user States, including China and South Korea in the future. At the same time, it has been reiterated that the sovereignty of the littoral States will be respected. Regional and international concerns over safety and security in the Strait of Malacca will continue to serve as an important external policy factor in the process of enhancing security in the strait and in the region. Continued discussions on the issue of enhancing maritime security in the Strait of Malacca under the IMO framework and in the existing regional security organizations, such as ASEAN, ARF, CSCAP, APEC, FPDA, WPNS and the Shangri-La Dialogue, are anticipated.

Challenges Ahead for the Management of Security in the Malacca Strait

Notwithstanding the many positive developments in relation to the management of security in the Strait of Malacca since June 2004, there are challenges lying ahead for both littoral and user States. One of the challenges is to petition the Joint War Committee to remove the Strait of Malacca from its list of war-risk areas. The shipping industries of the three littoral States of the strait have been asking the Committee to change its risk assessment, but without avail. Unless the littoral States are able to prove the effectiveness of their coordinated patrolling programs, it is likely that the strait will remain on the list.

The effectiveness of the tripartite coordinated air and sea patrolling programs agreed to by the three littoral States has also been questioned. A Singaporean maritime security analyst listed three limitations to the effectiveness of the cooperative programs: (1) the nations view independence and sovereignty very strongly and therefore generally are reluctant to agree to participate more actively in cooperative activities; (2) there is a gap between the nations with regard to law enforcement capacities; and (3) there exists political suspicion among them, in addition to the

lack of political frameworks that could facilitate more cooperative maritime security efforts. Ironing out their differences over the seriousness of the maritime security threats and the possible association between piracy and maritime terrorism in the Strait of Malacca and in Southeast Asia will be a challenge to the littoral States.

It has been pointed out that the law enforcement capacities of Malaysia and Singapore are good, but Indonesia's difficult resource problems need to be resolved if piracy and possible maritime terrorist attacks are to be dealt with effectively. It remains to be seen to what extent and how soon these problems can be resolved, either by significant investment provided by the littoral States themselves or by financial and technical aid from user States, such as the United States, Japan and India now, as well as Australia, China and South Korea in the future. The development of a closer strategic and military cooperation between the littoral States and foreign powers, in particular, the United States, could help justify the decision to offer more assistance to help the littoral States enhance their maritime security capabilities. The United States and Indonesia have resumed military ties, but progress towards greater accountability and complete military reform in Indonesia remains to be seen. The governments of Indonesia and Malaysia could reconsider their position on the PSI, such as by partially or selectively participating in the PSI activities. A positive development in this regard is the announcement made by the US government that it "stand[s] ready to help Indonesia and Malaysia, Singapore and Thailand to secure the Straits of Malacca."²⁴⁸ In addition, the signing of the Strategic Framework Agreement between the United States and Singapore in July 2005 could be welcomed by the other two littoral States as a positive development helpful to the enhancement of maritime security in the Strait of Malacca in particular and in Southeast Asia in general.

Another challenge to the effective management of security in the Strait of Malacca is how to find an acceptable approach that can compromise between the littoral States' sovereign concerns and the user States' demand for a more direct involvement in security matters in the strait. This requires that both sides reach agreement on establishing a burden-sharing mechanism or a multilateral/international cooperative security mechanism in the Strait of Malacca area. To help establish a burden-sharing mechanism, there is a need to amend Article 43 of the 1982 LOS Convention for the purpose of expanding the scope of burden sharing to include those costs associated with the management of security in the Strait of Malacca. The early establishment of a regional marine training center or a piracy/terrorism information sharing center would be seen as another important test of the political will of the littoral States and the concerned nations in the region to enhance security in the Strait of Malacca and in Southeast Asia.

Finally, it would be important for the littoral States to become contracting parties to the IMO's 1988 SUA Convention, the 2005 Protocol to the 1988 SUA Convention, and the 2004 ReCAAP agreement. At present, among the littoral States of the Malacca strait, only Singapore has ratified the 1988 SUA Convention and the ReCAAP agreement. It remains a challenge to have both Indonesia and Malaysia ratify the aforementioned maritime security-related international treaties.

Conclusion

Under the pressure spreading outwards from the United States, in particular through the proposal of RMSI and the consideration of deploying forces to deal with potential maritime security threats in the Strait of Malacca and Southeast Asia, the three littoral States—Indonesia, Malaysia and Singapore—were forced to adopt additional domestic anti-piracy and anti-terrorism measures and to develop tripartite coordinated sea and air patrol programs to improve security in the strait. New governmental agencies or units, such as the Malaysian Maritime Enforcement Agency, the Singaporean Accompanying Sea Security Team, and the Indonesian Maritime Policy Unit, have been formed to be responsible for managing security in the strait. More patrol boats have been acquired and new monitoring systems have been set up to help strengthen the littoral States' control over traffic in the strait. Bilateral cooperative programs have also been developed between the littoral States themselves and between the littoral States and user States, such as the United States, Japan and India, and perhaps in the future with China, South Korea and other nations, to keep the region's important waterways safe.

A number of important political statements, such as the Batam Agreement, the Jakarta Agreement of 2005 and the first ASEAN Defence Ministers' Statement of May 2006 have been adopted or issued, in which both littoral and user States are urged to take more cooperative actions to help enhance security in the Malacca strait. It seems that a more effective, collaborative approach to deal with the maritime security matters in the Malacca strait and in Southeast Asia has been developed since the first half of 2004. It is believed that this development will benefit the international maritime community and, in particular, the shipping industries that rely heavily on safe navigation of the Strait of Malacca. However, piracy and maritime terrorism and other transnational crimes in the strait and in Southeast Asia are likely to remain a major maritime security concern for governments and shipping industries for some years to come.

To deal effectively with maritime security threats in the Strait of Malacca, a number of challenges need to be overcome. These include the effectiveness of the implementation of the agreed tripartite coordinated sea and air patrols programs,

and the littoral States' ratification of the maritime security-related international conventions, in particular, the 2004 ReCAAP agreement, the 1988 SUA Convention and the 2005 protocol to the 1988 SUA Convention. There is also a need to establish a burden-sharing agreement that is acceptable to both the littoral and user States. But the challenge to be overcome as soon as possible is to have Lloyd's Joint War Committee remove the Strait of Malacca from its list of war-risk areas.

Notes

1. Other maritime security programs and initiatives include the Advance Electronic Cargo Information (24-Hour Rule), Container Security Initiative (CSI), Megaports Initiative, Transshipment Country Export Control Initiative (TECI), Proliferation Security Initiative (PSI), Maritime Transportation Security Act (MTSA), the International Ship and Port Facility Security (ISPS) Code, International Port Security Program (IPSP), Customs-Trade Partnership Against Terrorism (C-TPAT), US Coast Guard International Training Programs, Smart Box Initiative, 96-Hour Advance Notice of Arrival, Advance Passenger Information System Rule (APIS), the National Plan to Achieve Maritime Domain Awareness, the Global Maritime Intelligence Integration Plan, the Maritime Operation Threat Response Plan, the International Outreach and Coordination Strategy, the Maritime Infrastructure Recovery Plan, Maritime Transportation System Security Recommendations, the Maritime Commerce Security Plan and the Domestic Outreach Plan. See US Department of State, International Outreach and Coordination Strategy for the National Strategy for Maritime Security (2005), available at http://www.dhs.gov/xlibrary/assets/HSPD_IOCPlan.pdf.

2. For the principal threats to US maritime security, see US Department of Homeland Security & US Department of Defense, The National Strategy for Maritime Security 3–6 (2005), available at <http://www.whitehouse.gov/homeland/4844-nsms.pdf>.

3. International Outreach and Coordination Strategy for the National Strategy for Maritime Security, *supra* note 1, app. B, at 4.

4. *Strait of Malacca*, Wikipedia, the Free Encyclopedia, http://en.wikipedia.org/wiki/Strait_of_Malacca (last visited Mar. 27, 2007); C. S. Kuppuswamy, *Straits of Malacca: Security Implications*, Paper No. 1033, South Asia Analysis Group (SAAG), June 18, 2004, <http://www.saag.org/papers11/paper1033.html>.

5. Gal Laft & Anne Korin, *Terrorism Goes to Sea*, FOREIGN AFFAIRS, Nov.–Dec. 2004, at 67.

6. *Id.*

7. Henry J. Kenny, *China and the Competition for Oil and Gas in Asia*, ASIA-PACIFIC REVIEW, Nov. 2004, at 41.

8. The 1982 LOS Convention opened for signature on December 10, 1982 and entered into force on November 16, 1994. For the text, see UN Doc. A/Conf.62/122, Oct. 7, 1982, reprinted in 21 INTERNATIONAL LEGAL MATERIALS 1261–1354 (Nov. 1982). As of April 28, 2006, the Convention had 149 contracting parties. For the status of the Convention visit the website of the United Nations' Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/reference_files/status2006.pdf.

9. Thomas Orszag-Land, *UN Launches Global Initiative to Defend Malacca Straits*, JANE'S TERRORISM & SECURITY MONITOR, Jan. 19, 2005, http://www.janes.com/security/international_security/news/jtsm/jtsm050125_1_n.shtml.

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11. *Thailand to Join Malacca Strait Security System*, THAI PRESS REPORTS, Apr. 22, 2006, <http://www.thaivisa.com/forum/index.php?showtopic=66874&mode=threaded>.

12. President of the United States, *The National Security Strategy of the United States of America* (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>; President of the United States, *National Strategy to Combat Weapons of Mass Destruction* (2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

13. Ilan Berman, *The Bush Strategy at War*, NATIONAL INTEREST, Winter 2003/2004, at 51.

14. The term “maritime domain” was defined in the 2004 National Security Presidential Directive NSPD-41/Homeland Security Presidential Directive HSPD-13 as “all areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, or other navigable waterway, including all maritime-related activities, infrastructure, people, cargo, and vessels and other conveyances.” NSPD-41/HSPD-13 is available at <http://www.fas.org/irp/offdocs/nspd/nspd41.pdf>.

15. *USS Cole Bombing*, Wikipedia, the Free Encyclopedia, http://en.wikipedia.org/wiki/USS_Cole_bombing.

16. Prabhu Chawla, *Indo-US Military Alliance: Falling Back On India*, INDIA TODAY, Nov. 19, 2001, at 24; *India Plays Water Cop in Malacca with US*, INDIAN EXPRESS, Apr. 19, 2002.

17. See Ali M. Koknar, *Terror on the High Seas*, SECURITY MANAGEMENT ONLINE, June 2004, <http://www.securitymanagement.com/library/001617.html>; *The Sinister Strait—The Next Target for Terrorism and US Intervention*, JANE’S FOREIGN REPORT, July 1, 2004, http://www.janes.com/security/international_security/news/fr/fr040630_1_n.shtml; Briefings, *Malaysia’s Terrorism Dilemma*, JANE’S INTELLIGENCE DIGEST, June 18, 2004, <http://jid.janes.com/docs/jid/search.jsp> (then search for “Malaysia’s Terrorism Dilemma”); Catherine Zara Raymond, *How Real is the Threat From Maritime Terrorism?* THE POWER AND INTEREST NEWS REPORT (PINR), Dec. 12, 2005, http://www.pinr.com/report.php?ac=view_report&report_id=410&language_id=1; *Next for Terrorists: Seaborne Attacks*, WORLDNETDAILY.COM, Mar. 18, 2005, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=43358.

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19. Catherine Zara Raymond, *The Malacca Straits and the Threat of Maritime Terrorism*, THE POWER AND INTEREST NEWS REPORT (PINR), Aug. 24, 2005, http://www.pinr.com/report.php?ac=view_report&report_id=352&language_id=1.

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26. Details of the missions and area of responsibility of the US Pacific Command are available at <http://www.pacom.mil/about/pacom.shtml> (last visited Mar. 28, 2007).
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28. *Id.*, Q&A Session, available at <http://www.pacom.mil/speeches/sst2004/040331hasc-qa.shtml>.
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32. *Indonesia Shuns US Help in Malacca*, CHINA DAILY, Apr. 13, 2004.
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37. Robert Wohlschlegel, Curtis W. Turner & Kent Butts, *Maritime Threats Workshop*, United States Army Pacific's: Defense Environmental and International Cooperation (DEIC) Workshop, Center for Strategic Leadership, US Army War College, Issue Paper, Vol. 09-04, Oct. 2004, at 2, available at <http://www.carlisle.army.mil/usacsl/Publications/IP09-04.pdf>.
38. *Id.*
39. Information on the RMSI and other RMSI-relevant documents were removed from the Pacific Command's website (<http://www.pacom.mil/about/pacom.shtml>). My last visit was on October 16, 2005.
40. Commander, United States Pacific Command, *Strategy for Regional Maritime Security*, Nov. 2004, at 3.
41. *Id.*
42. *Id.* at 5–6.
43. *Id.* at 6–7.
44. *Id.* at 11–13.
45. NSPD-41/HSPD-13, *supra* note 14, at 2.
46. *Id.* at 2–3.
47. Available at <http://www.pacom.mil/rmsi> (last visited Oct. 16, 2005).
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50. Admiral William J. Fallon, US Navy, Commander, US Pacific Command, Remarks at the 4th Shangri-La Dialogue, Enhancing Maritime Security Cooperation, June 5, 2005, available at <http://www.pacom.mil/speeches/sst2005/050606-emsi-shangrila.shtml>.
51. The National Strategy for Maritime Security, *supra* note 2.
52. *Id.* at 4.
53. For details of these strategic actions, see *id.* at 13–24.
54. *Id.* at 15.

55. *Id.*

56. This plan lays the foundation for an effective understanding of anything associated with the maritime domain that could impact the security, safety, economy or environment of the United States, and of identifying threats as early and as distant from our shores as possible. Text available at http://www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf.

57. This plan uses existing capabilities to integrate all available intelligence regarding potential threats to US interests in the maritime domain.

58. This plan facilitates a coordinated US government response to threats against the United States and its interests in the maritime domain by establishing roles and responsibilities that enable the government to respond quickly and decisively.

59. This strategy provides a framework to coordinate all maritime security initiatives undertaken with foreign governments and international organizations, and solicits international support for enhanced maritime security. Text available at <http://www.state.gov/organization/64251.pdf>.

60. This plan recommends procedures and standards for the recovery of the maritime infrastructure following an attack or similar disruption. Text available at http://www.dhs.gov/xlibrary/assets/HSPD_MIRPPlan.pdf.

61. These recommendations provide strategic context to holistically improve the security of the Marine Transportation System. Text available at http://www.dhs.gov/xlibrary/assets/HSPD_MTSSPlan.pdf.

62. This plan establishes a comprehensive methodology to secure the maritime supply chain. Text available at http://www.dhs.gov/xlibrary/assets/HSPD_MCSPlan.pdf.

63. This plan engages non-Federal input to assist with the development and implementation of maritime security policies resulting from NSPD-41/HSPD-13. Text available at http://www.dhs.gov/xlibrary/assets/HSPD_DomesticOutreach.pdf.

64. The text of this strategy is available at <http://www.state.gov/r/pa/prs/ps/2005/57280.htm>.

65. Text available at <http://www.whitehouse.gov/nsc/nss.html>.

66. Text available at <http://www.whitehouse.gov/homeland/book>.

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- when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from any act
 - uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage;
 - discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
 - uses a ship in a manner that causes death or serious injury or damage;
- transports on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population or compelling a government or an international organization to do or to abstain from doing any act;
- transports on board a ship any BCN weapon, knowing it to be a BCN weapon;

- transports on board a ship any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and
- transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686.

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225. The CSCAP Charter and revised CSCAP Charter are available at <http://www.cscap.org/charter.htm>.

226. CSCAP Memorandum No. 1: The Security of the Asia Pacific Region (Apr. 1994); CSCAP Memorandum No. 2: Asia Pacific Confidence and Security Building Measures; CSCAP Memorandum No. 3: The Concepts of Comprehensive Security and Cooperative Security; CSCAP Memorandum No. 4: Guidelines for Regional Maritime Cooperation (Dec. 1997); CSCAP Memorandum No. 5: Cooperation for Law and Order at Sea (Feb. 2001), all available at <http://www.cscap.org/publications.htm>.

227. CSCAP Memorandum No. 1, para. C (4), *supra* note 226.

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232. APEC Leaders Statement on Counter-Terrorism, Shanghai, China, Oct. 21, 2001, <http://www.infojapan.org/policy/economy/apec/2001/leader.html>.

233. APEC Leaders' Statement on Recent Acts of Terrorism in APEC Member Economies, Los Cabos, Mexico, Oct. 26, 2002, http://www.mofa.go.jp/policy/economy/apec/2002/state_terror2.html.

234. APEC Leaders' Statement on Fighting Terrorism and Promoting Growth, Oct. 26, 2002, <http://www.sccp.org/sccplibrary/otherdocs/LeadersStmntFightTerrorNGrowth.pdf>.

235. The First APEC STAR Conference was held in Bangkok, Thailand in 2003; the Second STAR Conference in Viña del Mar, Chile, 2004; the Third STAR Conference in Incheon, Korea, 2005; and the Fourth STAR Conference in Hanoi, Vietnam in February 2006.

236. Chairman's Summary Report and Recommendations of the APEC STAR III Conference, Incheon, Korea, Feb. 25–26, 2005, http://www.apec.org/apec/documents_reports/counter_terrorism_task_force/2005.html#STAR (then follow "STAR Conference" and "Chairman's Summary Report and Recommendations of the APEC STAR III Conference" hyperlinks).

237. The origin of WPNS lies in the biennial International Seapower Symposium conducted by the United States Navy. It changed in 1988 when the Australian chief of naval staff agreed to host the first WPNS in Sydney. Members of the WPNS include Australia, Brunei, Cambodia, China, France, Indonesia, Japan, Malaysia, New Zealand, Papua New Guinea, the Philippines, Russia, Singapore, South Korea, Thailand, Tonga, the United States and Vietnam. Four observers are Bangladesh, Canada, Chile and India.

238. The FPDA was established in 1971 to ensure the defense of Malaysia and Singapore. Participating nations are Australia, Britain, Malaysia, New Zealand and Singapore.

239. Azrin Asmani, *FPDA: Malaysia Open to Review of its Scope*, STRAITS TIMES (Singapore), June 7, 2004.

240. Dominique Loh, *FPDA to Focus on Non-Conventional Threats to Regional Maritime Security*, CHANNEL NEWSASIA, June 7, 2004, available at http://app-stg.nssc.gov.sg/data/2004_04_7FPDA.doc.

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246. Based on the April 2006 IMB's Piracy and Armed Robbery Against Ships report for the period January 1 to March 31, 2006. See Katy Glassborow, *IMB Report Charts Piracy's Shifting Trends*, JANES.COM, May 4, 2006, <http://www2.janes.com/index.html> (search by article title then follow hyperlink).

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VIII

Actual and Future Threats Emanating from the Commons: A Chilean Approach

Francisca Möller and Jorge Balaresque*

Introduction

Strategy is about solving problems—in fact, the best strategy is the best solution to that problem. This very simple way of looking at strategy is in itself very complex. The problem that needs to be solved must be well defined and understood and the strategic solution has to be feasible with the means that are in hand. To complicate things further, most of the situations that need solving are probably all “in the future.” Additionally, the problem may be simply stated as “terrorism,” but we all know that is not enough. Apart from some novelist, who could have conceived that commercial airplanes could be used in such a horrible manner as they were on September 11?

This “solution” must also fit scenarios that themselves will undoubtedly differ from region to region throughout the world, even from country to country. A resolution that is good for one region or country may not be applicable to another. Thus, when in 1947, a Chilean lawyer from Viña del Mar—does anybody today remember his name?¹—presented his theory of an expanded coastal State territorial

* Francisca Möller is Professor of International Law, Chilean Naval War College (Academia de Guerra Naval). Rear Admiral Jorge Balaresque, Chilean Navy (Ret.), is Professor and Head of the Strategy Department, Chilean Naval War College. The views expressed in this article are those of the authors alone and do not necessarily represent the views of the Chilean Government, the Chilean Navy or the Chilean Naval War College.

sea, who anticipated that it would evolve into the 200-nautical-mile exclusive economic zone (EEZ) that is now universally accepted? In 1947, he was presenting a solution for the risk to the national whaling industry as foreign whalers operating just off Chilean shores were very quickly exterminating the mammals.

Solutions also have their own levels of responsibility: the political or grand strategic level decision makers have to be able to recognize the problems, state their objectives and create the necessary means—and perhaps the legal structure—to attain them. On the other hand, the “means” or forces that will implement the policies need clear-cut instructions as to what they can or cannot do in resolving the problem. As we all know with regard to threats at sea, there will always be a conflict between the freedom of the seas and certain control measures that would help to confront the threats effectively.

Globalization has resulted in the rapid advance of communications capabilities and technology, a great mobility of humans and capital, a weakening of commercial barriers and the creation of important multinational corporations, which every day acquire a greater importance in international affairs. All this has made borders more permeable and the world economies more interdependent, with all the advantages and disadvantages that this entails. Globalization provides enormous benefits and opportunities, but it also has negative effects. Unfortunately the benefits are still concentrated in a few nations, creating false expectations, rivalries, tensions and divisions among the rest. We know that today most conflicts are intra-State conflicts. These originate for multiple reasons, including lack of governance, corruption and ethnic and religious problems. All of these are causes of instability, civil war, social disorder, systematic violations of human rights, massive migration and frontier tensions. These effects not only create instability in the States where they occur but also have the potential to cause negative repercussions within the region or throughout the whole international system. The world has seen a polarization of those who support and those who oppose globalization. The former focus on the possible benefits associated with participating in the global economy. The latter are concerned that they are too far removed from the level of economic development that would permit them access to globalization’s benefits, or they consider globalization to be the cause of all their problems—the loss of national identity, the relaxation of moral values and the weakening of the principle of sovereignty of States.

In a globalized world, we have not only the traditional threats, but new threats giving rise to new risks have emerged. These are not planned or organized by a State—at least not openly. These risks rise from the proliferation of international criminal organizations, piracy, cyber attacks, small arms trafficking, the spread of weapons of mass destruction, drug trafficking and terrorism. We must also mention potential AIDS and bird flu pandemics and natural disasters and other problems, such as droughts, floods, soil degradation and overexploitation of natural

resources. All these phenomena are considered transnational, as they cross international boundaries.

Writing from the perspective of a distant country our objective is to show the importance of the sea to Chile as a maritime nation and how turning to some “old” ideas may help find an effective and efficient way to create the indispensable cooperation needed to confront the “new” threats that affect the world.

The New Threats at Sea

The sea has always contributed to human development through its four main attributes: its resources, its utility as a means of transportation and trade, as a means of exchanging information and, finally, as a source of power and dominion.² In the past, the maritime resources of most States were mainly dedicated to pursuing their national interests relating to military power and dominion. Today the new threats, particularly those which threaten the environment and transportation, must be confronted in a new way. “Good order at sea”³ requires three very important issues to be addressed effectively: maritime awareness, maritime policy and integrated maritime governance. Simply reflecting on the titles of these issues indicates the need for a wide base of understanding if we are to succeed in combating the new threats.

Today the use of the global commons presents much more complex problems than when it was referred to as a “wide common” by Admiral Mahan late in the nineteenth century.⁴ Today the threats and risks cover a very wide range. We will only discuss some that we consider especially important.

As addressed at the ASEAN Regional Forum in 2003, piracy, which has existed from time immemorial, has now emerged in a new form: “Piracy and armed robbery against ships and the potential for terrorist attacks on vulnerable sea shipping threaten the growth of the Asia-Pacific region and disrupt the stability of global commerce, particularly as these have become tools for transnational organized crime.”⁵ Other threats from and on the global commons include smuggling, drug trafficking, illegal immigration, banditry, human smuggling and slavery, environmental attack, trade disruption, and weapons proliferation, including weapons of mass destruction and terrorism.⁶

Chilean Maritime Interests

Chile, with its unique shape, is not a very large country in terms of its land territory, but its length entitles it to a huge expanse of territorial and exclusive economic zone waters. If you add to this Chile’s geographical position in the world, plus an

economic system that is outward looking, you can understand that for Chileans the sea is of great importance.

From 1990 to 2005, Chile's foreign trade by sea rose from thirty million metric tons to seventy million tons. In 2005, 85 percent of Chile's foreign trade was by sea. That year, Chilean exports transported by ship totaled \$14.5 billion to Asia and Oceania, \$9.8 billion to Europe, \$7.6 billion to North America and \$125 million to Africa.⁷

Although Chile is far removed from many areas of the world, events occurring elsewhere can quickly and negatively impact Chile. As an example, although the rise in foreign trade was generally steady from 1990 to 2005, the 1997 Asian economic crisis, which had nothing to do with Chile, led to a decrease in Chilean shipping and hardships for the Chilean economy that lasted for several years.

Key Vulnerabilities

Chile heavily depends on its sea lines of communication. Nearly 90 percent of its increasing foreign trade must travel by sea, 100 percent of fuel imports come by sea and by 2009 most of the natural gas needed will come as liquefied natural gas on ships whose cargoes can themselves be a weapon of mass destruction in the hands of terrorists and will, of course, require special security.

Although Chile is in a geographic region that to date has not been the subject of serious terrorist threats, the government is aware of the dangers that terrorism presents. This is why Chile is party to numerous international conventions.⁸ The latest international treaties ratified are an expression of our agreement with the international effort to combat terrorism following the 9/11 attacks.

Illegal fishing and overexploitation of fishery resources are a worldwide concern and Chile is no exception. To address these, the government has imposed quotas on Chilean fishing companies that fish in our exclusive economic zone and Presential Sea, but it has not been possible to prevent illegal fishing by foreign enterprises that are obviously overexploiting some areas and endangering certain highly migratory and straddling stocks.

Pollution of our seas is also a major threat to Chile. As one example, Chile is one of the most important producers of salmon, which require clean water.

The Panama Canal is of primary importance for Chile. Chilean shipping is the fourth largest world user and largest South American user of the canal. Any interruption to the flow of shipping through the canal will immediately affect our economy and Chilean exports may become uncompetitive because of increased shipping costs and times.

The Strait of Magellan and Drake Passage, although not the busiest sea lanes in the world, are of great importance as an alternative to the Panama Canal. The use

of these passages is growing yearly as a consequence not only of the increase in world trade, but also due to the increase in post-Panamax vessels (those too large to transit the Panama Canal), vessels carrying dangerous cargoes prohibited from canal transits, and technology advances that now allow larger ships to sail the high latitudes safely. These increases in the use of the Strait of Magellan and Drake Passage raise the risk of collisions.

Chilean Policy

Chilean defense policy recognizes that—apart from providing the traditional aspects of protecting the citizens and national interests and safeguarding territorial integrity and sovereignty—a modern view must include international security and stability as factors that affect Chile's own national security.⁹ Although oriented in the first place to dissuade any threats, it recognizes that defense forces must be prepared to act coercively in defense of national interests if dissuasion doesn't work. It also quite definitely expresses that Chile is prepared to cooperate with other States,¹⁰ especially under UN mandates, as the best way to address non-conventional threats.

In the near term, Chilean foreign policy has the challenge of increasing Chile's place in this new globalized and interdependent world. Chile is today a nation that has left behind its traditional insularity, and, faced with globalization, has chosen to try to influence it so as to minimize its risks and to take part in its opportunities. Accomplishing these objectives will require diversified strategies.¹¹

Taken together Chilean defense and foreign policies present three challenges: first, contributing to international peace and security; second, participating in Latin American governability and social cohesion; and, finally, becoming a bridge and platform between Latin America and Asia.

In meeting these challenges, the Chilean Navy is prepared—no easy task, considering the size of the area to protect, the limited assets available and the growing maritime interests—not only to fulfill the traditional naval role of national defense, but to participate actively in preserving Chile's other maritime interests. In that regard, in Chile the functions normally performed by coast guards in other nations are the responsibility of the navy. Finally, the navy also participates in international cooperation initiatives with other countries, particularly, as indicated previously, in operations conducted under UN auspices.

For many years, the navy has participated in multilateral and bilateral exercises with other navies to develop the interoperability necessary for effective operations in the maritime environment. An interesting example was the sponsorship of Panamanian Maritime Force training, and creating and participating in special exercises to increase security in the Panama Canal area.

The Chilean navy is today a very efficient armed service comprised of a sound and modern organization of men, infrastructure and the technical means to provide effective command and control. It is a navy that is fully capable of the necessary—and indispensable—coordination in its operations with international and government specialized agencies. The navy effectively covers Chilean territory from the maritime boundary with Peru in the north to the Antarctic in the south and is equipped with the aircraft and ships to control the open waters under Chilean jurisdiction and our littoral and internal waters.

Chile has developed a maritime power appropriate for its level of development and a navy that is organized and equipped consistent with the principle that “a fleet that concentrates on maintaining a presence on the high seas and patrolling in support of the sea lanes of communication is far more effective in identifying and countering threats to one’s national security than a coastal-defense fleet.”¹²

Confronting the New Threats

It is important to point out initially that in confronting the threats of the twenty-first century, it is necessary to find appropriate responses to those threats within the international system and responses that are consistent with international law. Under the law of the sea, the flag State has the responsibility of exercising jurisdiction and control over vessels registered under its flag and has the obligation of carrying it out in accordance with its own national legislation, the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention)¹³ and international conventions approved within the International Maritime Organization (IMO) framework. The 1982 LOS Convention permits a State that has reason to believe that jurisdiction and control have not been executed properly regarding a specific vessel registered with another State to communicate this to the flag State, which is to investigate and take any necessary actions to remedy the situation.¹⁴

Recognizing that the flag State has not always effectively fulfilled its obligation of exercising jurisdiction and control over its flag vessels, the principle of port-State control is provided for by various international conventions.¹⁵ This principle empowers their port State to inspect foreign shipping in their ports. In addressing port-State control, special mention must be made of the International Ship and Port Facility Security Code (ISPS Code).¹⁶ The primary objective of the ISPS Code is to strengthen the security of international shipping, ports, waterways and the high seas by directing governments, shipping companies and port operators to enhance the security of the maritime enterprise. The ISPS Code also places responsibility on port authorities to undertake detailed security assessments, including response plans, to identify threats and vulnerabilities.¹⁷

On the other hand, the 1982 LOS Convention provides explicit rights to the coastal State within its EEZ regarding fishing and to prevent, reduce and control pollution of the maritime environment.¹⁸ There also are conventions that permit a coastal State to act beyond its EEZ, such as the International Intervention Convention¹⁹ in instances in which an accident beyond the EEZ causes pollution that may affect the coastal State, the International Convention for Search and Rescue (SAR)²⁰ and others.

The Presential Sea as a Useful Tool for Confronting the New Threats

When the Presential Sea concept was first advanced, the threat was uncontrolled exploitation of fishing stocks, particularly migratory and straddling fishing resources. Today the threats are far more diverse, but we believe the Presential Sea is an alternative that can be useful in confronting these new threats.²¹

But, what is the Chilean Presential Sea? Geographically, it is that part of the ocean space between the outer limits of Chile's continental exclusive economic zone and the meridian which, passing through the western edge of Easter Island's continental shelf, extends north to the international boundary with Peru and south to the South Pole.²² It is depicted as follows:

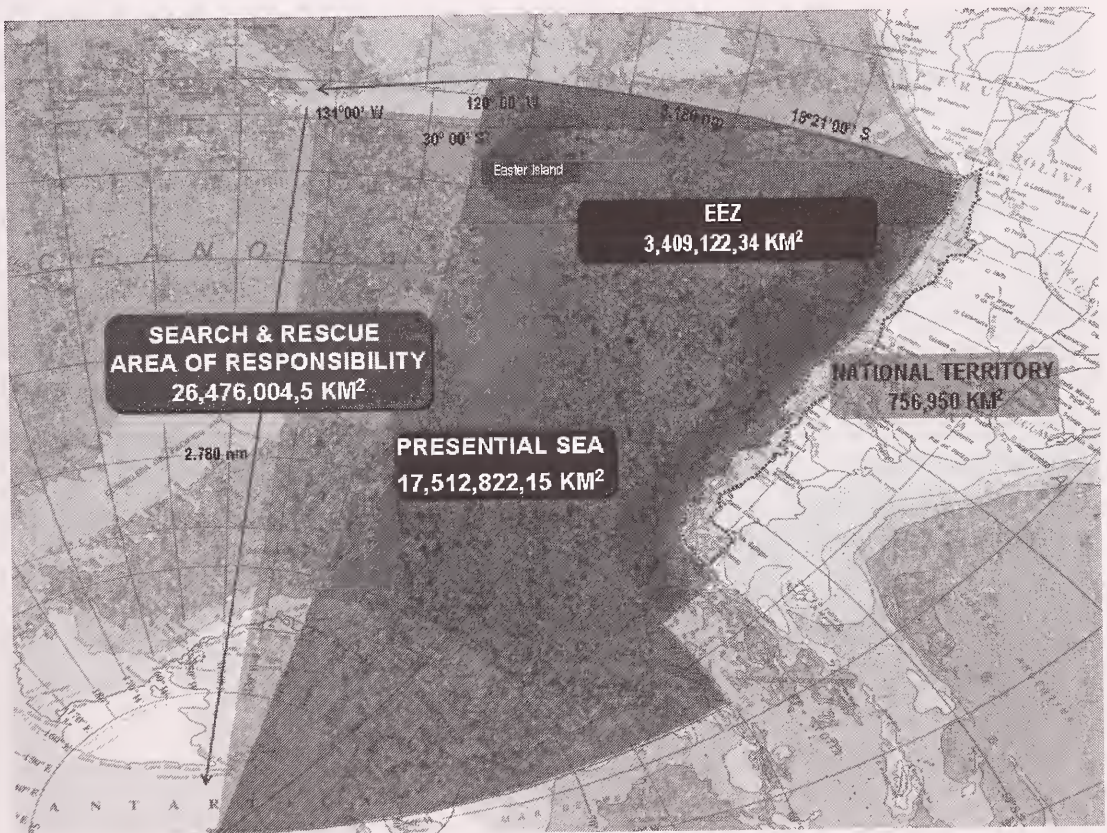


Figure 1. Chilean Presential Sea and SAR Area of Responsibility²³

The Presential Sea is an area in which Chile maintains a presence to protect the national interests and takes part in economic activities that will contribute to national development. "This concept expresses the will to be present in this part of the high seas with the aim of projecting maritime interests regarding the rest of the international community, watch over the environment, preserve the natural resources, with exact adherence to International Law."²⁴

The Presential Sea is Consistent with International Law

The concept of the Presential Sea was first articulated in 1991. Immediately there were critics who expressed concern that the Presential Sea was an attempt to assert Chilean jurisdiction beyond those limits established in the 1982 LOS Convention. One writer described it as "a very disturbing precedent."²⁵

Professor Vicuña, who served as president of the Chilean Delegation to the Third United Nations Conference on the Law of the Sea (1973–1983), responded to those critics:

The meaning and extent of the Presential Sea can be explained in the light of the developments set forth above since it closely responds to the expression of a special interest of the coastal State, in this instance Chile, but which can also be applied to many other geographical situations throughout the World. . . . [I]t involves firstly the participation in and surveillance of the activities undertaken by other States in the high seas areas of particular interest to the coastal State. In this regard it is not a question of excluding any State from such areas, but, on the contrary, of ensuring the active inclusion of the coastal State concerned. . . .

There is no question of exclusive coastal State rights involved in this concept, or the drawing of new maritime boundaries in a legal sense; neither should participation in such activities be understood as a kind of compulsory intervention by the coastal State in the activities undertaken in by other countries, but only as ensuring its own right to operate actively in the area. The concept expressly safeguards the legal status of the high seas established by the United Nations Convention on the Law of the Sea. . . . It follows that the approach has been conceived in a manner entirely consistent with the current status of the Law of the Sea.²⁶

Satya Nandan, who headed the Fijian delegation to the Third United Nations Conference on the Law of the Sea and served as chairman of the conference working groups on the exclusive economic zone, delimitation of maritime boundaries and the high seas, in addressing the accomplishments of the 1982 LOS Convention, believed:

A major achievement of the 1982 Convention was to rationalize different uses and thereby reconcile the competing interests of states. The balance thus attained has greatly reduced the proliferation of incoherent regimes, as states adopt national legislation to conform to the regimes of the Convention. In that sense, the Convention has had a stabilizing effect, reducing uncertainty and instability in the peaceful use of the oceans.²⁷

He continued:

For the future, the interest of all nations in a peaceful order of the oceans lies in uniform and consistent application of the principles established in the Convention. Differences between parties and non parties to the Treaty, and even between non parties, may be resolved by observing the norms of cooperative conduct and international resolution established by the Convention. Open conflicts and confrontations and unilateral assertions of new jurisdictional regimes will not contribute to the stability and certainty necessary in the international movement toward the rule of law. . . .²⁸

Jane Dalton observed a few years later that

[T]he Mar Presencial is a juridical concept offered to support Chilean national aspirations. The challenge to Chile and the international community is to attain Chilean aspirations within the framework of the existing Convention regime. The Mar Presencial may be the tool that enables Chile to do so. It must not be the tool by which the erosion of the regime begins.²⁹

Beyond the fact that Chile desires a greater participation in Pacific Ocean activities, whether those are international trade, protection of the maritime environment, conservation of its resources or addressing threats arising on or coming from its waters, it has never been Chile's intention to act unilaterally, but through active participation in international organizations, specifically, the United Nations, the Organization of American States and the International Maritime Organization.

Maritime Domain Awareness

It is interesting to note how a similar concept to the Presential Sea has been developed by the United States, which has labeled it Maritime Domain Awareness (MDA).³⁰ Admiral Thomas Collins, commandant of the US Coast Guard, speaking at the US Naval War College, stated:

From a risk-mitigation perspective, MDA is perhaps the highest return element of our application of maritime power. Simply put, MDA is processing comprehensive

awareness of the vulnerabilities, threats, and all matters of interest on the water. It means having extensive knowledge of geography, weather, position of friendly vessels and potential threats, trends, key indicators, anomalies, intent and the activities of all vessels in an area of concern, including the innocent. . . . If knowledge is power, and MDA provides us the requisite knowledge of the maritime [spectrum], then MDA is the key to maritime power. MDA, and the knowledge it will bring, will allow maritime forces to respond with measured and appropriate force to meet any threat on, below or above the sea and, taken to an ultimate state, will provide the necessary awareness to create “nonevents,” proactively preventing incidents, challenges, and devastation.³¹

International Cooperation and Voluntary Agreements

Vice Admiral John Morgan, deputy chief of naval operations for information, plans and strategy, and Rear Admiral Charles Martoglio, director of the Strategy and Policy Division, in the US Navy’s Office of the Chief of Naval Operations, in describing the importance of the seas and the interests of all nations in ensuring the security of the oceans, stated:

Promoting and maintaining the security of the global maritime commons is a key element because freedom of the seas is critical to any nation’s long-term economic well-being. The impact of the commons on trade, international commerce, and the movement of people is significant, making security on the high seas, and in the world’s littorals, harbors, and ports, a cornerstone of prosperity. Likewise, the exploitation of the maritime domain by nations, groups, or individuals must be considered a global challenge. Policing and protecting the maritime commons against a wide spectrum of threats is a high priority for all nations interested in the economic prosperity and security that comes from a safe and free maritime domain.”³²

Admiral Collins, in his 2003 address at the International Seapower Symposium, described how 9/11 forced the United States to rethink its approach to maritime power in the context of maritime security as resting purely on military power in indicating:

[M]aritime security is a concerted effort that encompasses more than just protecting the nation’s national interest against hostile nations, clearly. It includes protection against terrorist attacks; protection of our sovereign natural resources, environment, and the like. To reduce these risks in this new security environment, it requires a special application, I think, of concerted, integrated maritime power at four major areas of emphasis: to (1) increase our awareness of all activities and events in the maritime environment; (2) very importantly, build and administer an effective maritime security regime both domestically and internationally; (3) increase military and civil operational presence—persistent presence—in our ports and coastal zones and

beyond, for a layered security posture; and (4) improve our response posture in the event a security incident does occur.³³

The twenty-three States attending the 2003 ASEAN Regional Forum emphasized the importance of national and regional cooperation to the maintenance of maritime security:

To deal with this increasingly violent international crime, it is necessary to step up broad-based regional cooperative efforts to combat transnational organized crime, including through cooperation and coordination among all institutions concerned, such as naval units, coastal patrol and law enforcement agencies, shipping companies, crews, and port authorities;

Such efforts must be based on relevant international law, including the 1982 Law of the Sea Convention;

It is important that there be national and regional cooperation to ensure that maritime criminals and pirates do not evade prosecution;

Effective response to maritime crime requires regional maritime security strategies and multilateral cooperation in their implementation;

National, Regional and International efforts to combat terrorism also enhance the ability to combat transnational organized crime and armed-robberies [*sic*] against ships.³⁴

We think international organizations have an important role, particularly the International Maritime Organization (IMO), which effectively addresses a wide variety of maritime affairs, in furthering international cooperation. International instruments and recommendations/guidelines have been approved for the suppression of piracy and armed robbery against ships and fixed platforms, including the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation³⁵ and its Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf³⁶; the 1974 International Convention for the Safety of Life at Sea,³⁷ particularly the new Chapter XI-2, the International Ship and Port Facilities Security Code³⁸; the 2005 Protocol of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation³⁹; and the Protocol of 2005 for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.⁴⁰ IMO

measures adopted to enhance maritime security have greatly contributed to strengthening international maritime security.

The contributions of international organizations have been recognized in a range of international conferences; for example, in January 2006, the Tokyo Ministerial Conference on International Transport Security “welcomed and supported the vigorous maritime security activities undertaken by relevant international organizations, particularly, the International Maritime Organization (IMO) and the World Customs Organization (WCO).”⁴¹

Also, the Ninth Asia Pacific Heads of Maritime Safety Agencies (APHMSA) Forum, held in Viña del Mar, Chile from April 18–22, 2006,⁴² stressed that the fight against international terrorism and criminal acts at sea constitutes a goal for all States, with the purpose of assuring people’s integrity and development through safe and free trade, and that cooperation among member States is imperative in addressing these non-traditional threats. During the forum, the US delegation explained the meaning of Maritime Domain Awareness (MDA). The communiqué issued at the conclusion of the forum addressed MDA as follows:

It was also acknowledged by the Forum that for MDA to be effective, information from all maritime mission areas must be integrated, and that the sharing of maritime information among international partners, particularly among APHMSA members, is essential in achieving transparency. . . .

Noting the great potential for MDA to contribute to many aspect[s] of maritime safety, SAR, environmental protection, as well as security, the Forum suggested further work should be carried out or discussed at [a] future meeting regarding the precise benefits which can be derived.⁴³

There are a number of voluntary agreements created by the United States after 9/11 that are designed to address threats from and on the sea. These include the Container Security Initiative (CSI),⁴⁴ the Proliferation Security Initiative (PSI)⁴⁵ and the Regional Maritime Security Initiative (RMSI),⁴⁶ directed specifically at the Strait of Malacca. While the international community supports their objectives,

[They] have received a mixed bag of responses from the maritime nations. The PSI raises some fundamental issues under the United Nations Convention of the Law of the Sea (UNCLOS). Maritime specialists argue that under the customary international law all vessels have the freedom of movement on the high seas and therefore the freedom of navigation on the high seas is absolute. Therefore, there is no justification in boarding and searching a ship if it has a nationality, not engaged in piracy or slave trade. Analysts doubt the right of the powerful nations to violate the basic principles and norms enshrined in the UNCLOS. . . . The daunting challenge however, is how to

address these Initiatives in a comprehensive, yet cost-effective way, without challenging sovereignty issues and dramatically restraining the flow of commerce.”⁴⁷

Another author’s concerns were not just with the legal issues raised by the CSI and PSI but with their focus on protecting US interests and the unilateral process by which they were created:

So far, many states have gone along with CSI and PSI. However, the high costs of compliance evoke images of colonialism and hegemony. The stationing of U.S. Customs officials in the sovereign ports of foreign states might be seen as intrusive. PSI and CSI may also limit the rights of commercial vessels operating internationally to remain free from arbitrary search and seizure. The initiatives are directed exclusively toward safeguarding U.S.-bound shipping. . . . Further, they exclude WMD and related shipments by the U.S. to its allies. On the whole, CSI and PSI lack transparency, reciprocity, and accountability; they are unilateral U.S. measures prompted by the 9/11 attacks.

It may be that this is the necessary cost of increased maritime security in the twenty-first century. If many countries are willing to accept this type of non-consultative and unilaterally-driven process that would indicate a very significant change in the way international regulations are framed and implemented. It would constitute a major shift from negotiated multilateralism of the post-war system to cooperative unilateralism under post-Cold War American hegemony.⁴⁸

We believe that necessary changes or modifications to international legislation must be accomplished within the framework of the United Nations. The history of efforts to create new international conventions or modify existing ones has shown, however, that this can sometimes be a lengthy process. In the face of the new threats and the dangers they create, the international community must be prepared to act promptly to adopt procedures that provide effective responses to terrorism and proliferation.

The law of the sea has developed and evolved over centuries of the use of the oceans. Sometimes those changes can occur rapidly; other times—and more frequently—changes require a lengthy period. An example of the latter is the definition of piracy as it appears in the 1982 LOS Convention,⁴⁹ a definition that has existed essentially unchanged for hundreds of years. In addressing the need to change the law, the political advisor to Striking Force NATO observes:

In recent years, efforts have been made to loosen the restrictive UNCLOS definition [of piracy]. The 1988 Rome Convention on Suppression of Unlawful Acts at Sea (SUA) dropped the high seas and private act limitations of Article 101, but SUA focuses on jurisdiction, not enforcement. The signatories are required to criminalize such acts,

and to either exercise jurisdiction over persons in their territory, or to extradite them to another state with a valid stake in the action. Crucially, it does not authorize hot pursuit.

What then, can states and navies, legally do?

On the high seas, and within one's own waters, boarding and arrest can be exercised under the universal jurisdiction rubric, or where the pirates are of that state's nationality. . . .

Also relevant are recent anti-terrorist initiatives, such as the 2005 revisions to the SUA convention that allow states to agree that others may board vessels flying their flag after notification.

In practice, acts of piracy and maritime terrorism may be indistinguishable, the question of intent usually determined after the fact. Thus initiatives to suppress terrorism may assist in the fight against piracy, and vice versa.⁵⁰

We believe a more straightforward approach is to make proliferation of weapons of mass destruction a global crime, like slavery or piracy. Today the law provides that warships of any nation have the right to visit a ship where there is reasonable ground for suspecting that the ship is engaged in slavery or piracy or is stateless.⁵¹ Given the new threats, it is not reasonable that action cannot be taken in cases of terrorism at sea.

Conclusion

Chile is dependent on the sea. In our opinion, Chile recognizes the threats created by the current international environment to the use of the oceans and is forward looking in identifying future circumstances that could affect the nation. The Chilean government has developed and articulated policies that provide appropriate guidance to government agencies in directing their organizations to carry out those policies. Specifically in the case of the navy, it has developed and adapted its means towards the objectives established by the government.

Effective responses to illicit acts require multilateral cooperation at both the international and regional level. While the possible solutions to the new threats are to be found principally working with the United Nations and the International Maritime Organization, we must look beyond them to various national public and private agencies and organizations that are in charge of maritime security. The solutions adopted to date are properly focused by involving not only governments

but also shipping companies, port authorities, customs officials, navies, coast guards, etc.

We believe that ensuring “good order at sea” worldwide requires an improved level of awareness, effective policy and integrated governance. The United Nations must be the structure within which States act to develop the long-term legal framework. We recognize, however, that there must be a mechanism, such as that provided by the International Maritime Organization, there to provide the short-term guidance required for the maritime power of States to effectively confront the threats not just as they arise, but hopefully before they appear.

The 1982 Law of the Sea Convention has been the vital legal structure to keep order at sea. Even if the prerogatives of the flag State are irreplaceable, port-State control has become an efficient complement. Even so, we think that whatever prerogatives the law of the sea confers upon individual States, the Presential Sea concept is a useful tool for the surveillance of the high seas adjacent to the exclusive economic zone. It provides an “area of responsibility” for States to provide the control of that sea space necessary to address the new threats, without affecting in the least the freedom of the seas. On the contrary, it preserves the freedom to use the seas and makes that use safer for mankind.

Notes

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3. *Id.*
4. ALFRED THAYER MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY 1660–1783*, at 25 (5th ed. 1894).
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7. CHILEAN MARITIME AUTHORITY (DIRECCIÓN GENERAL DEL TERRITORIO MARÍTIMO), *BOLETÍN ESTADÍSTICO MARÍTIMO* 95 (2005).
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9. *Id.* at 52.
10. *Id.* at 46.
11. Ignacio Walker, Chilean Foreign Minister, *Scenarios Facing Chile for the Bicentennial: A Vision of State*, Address at the Opening of the Academic Year, National Academy of Political and Strategic Studies, Santiago, Chile, Apr. 1, 2005, *available at* http://www.anepe.cl/3_foro/Conferencias/clasemag_walker.htm.

12. Jane Gilliland Dalton, *The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?*, 8 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 397, 409 (1993). “Mar Presencial” and “Mar Presential” are two terms for the same concept.

13. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, reprinted in 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter 1982 LOS Convention]. The convention was ratified by Chile in 1997.

14. *Id.*, art. 94.6

15. See, e.g., 1982 LOS Convention, *supra* note 13, art. 218. In addition, the IMO has encouraged the establishment of regional port State control organizations. Chile is a member of both the Viña del Mar (Latin America) and Tokyo (Asia and Pacific) regional Memorandums of Understanding.

16. The ISPS Code imposes new international regulations upon the shipping industry, including, *inter alia*, requirements for security plans for “ships and port facilities.” See The International Ship and Port Facility Security Code, http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689#code (last visited Mar. 13, 2007).

17. Vijay Sakhuja, *Looking Beyond International Ship and Port Facility Security (ISPS) Code*, South Asia Analysis Group, http://www.mima.gov.my/mima/htmls/mimarc/news/newsflash_files/news-cut/aug05.htm (last visited Mar. 19, 2007).

18. 1982 LOS Convention, *supra* note 13, Parts V and XII.

19. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765.

20. International Convention on Maritime Search and Rescue, Apr. 27, 1979, 1405 U.N.T.S. 97.

21. In May 1990, Admiral Jorge Martínez Busch, commander-in-chief of the Chilean Navy, speaking in Viña del Mar, Chile, said, “The great task of the present generation is the effective utilization of our seas.” Perhaps today’s “great task” is to preserve the ability to effectively counter threats from and on the seas.

22. CHILEAN DEFENSE WHITE BOOK, *supra* note 8, at 24.

23. Chilean Maritime Authority (Dirección General del Territorio Marítimo), Chilean Presential Sea and SAR Area of Responsibility, Presentation at the Chilean Naval War College (2005).

24. CHILEAN DEFENSE WHITE BOOK, *supra* note 8, at 24.

25. Dalton, *supra* note 12, at 415.

26. Francisco Orrego Vicuña, “*The Presential Sea*”: *Defining Coastal States’ Special Interests in High Seas Fisheries and Other Activities*, 35 GERMAN YEARBOOK OF INTERNATIONAL LAW 265 (1992).

27. Dalton, *supra* note 12, at 417, summarizing the views expressed in Satya Nandan, *Prospects for the Future: The UN and Peaceful Uses of the Oceans*, 18 LAW OF THE SEA INSTITUTE PROCEEDINGS 259, 261 (1985).

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31. Thomas H. Collins, *Maritime Power for the Twenty-First Century*, Luncheon Address at the Sixteenth International Seapower Symposium, US Naval War College, Newport, Rhode Island, Oct. 27, 2003.

32. Morgan & Martoglio, *supra* note 6, at 14.

33. Collins, *supra* note 31.

34. Statement on Cooperation Against Piracy and Other Threats to Maritime Security, *supra* note 5.
35. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201.
36. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304.
37. International Convention for the Safety of Life at Sea (SOLAS), 1974, http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647 (last visited Mar. 19, 2006).
38. See *supra* text accompanying note 17.
39. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Oct. 14, 2005, IMO Doc. LEG/CONF. 15/21, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/notinforce/2005/30.html?query=suppression%20of%20unlawful%20acts>.
40. Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Oct. 14, 2005, IMO Doc. LEG/CONF. 15/22, available at <http://bar.austlii.edu.au/au/other/dfat/treaties/notinforce/2005/31.html>.
41. *Tokyo Ministerial Conference on International Transport Security pays tribute to IMO measures*, IMO NEWS, Mar. 5, 2006, at 8, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14397/IMONews12006.pdf. Transport ministers from Australia, Canada, China, Germany, Indonesia, Republic of Korea, Russian Federation, Singapore, United Kingdom and United States participated in the conference.
42. The forum was attended by delegations from Australia, Canada, Chile, China, Hong Kong, Japan, Malaysia, New Zealand, Solomon Islands, Philippines, Korea, Singapore, United States, Vanuatu and Vietnam.
43. Ninth Asia Pacific Heads of Maritime Safety Agencies Forum, Communique, available at <http://www.directemar.cl/apec/documents/ChileCommunique.pdf> (last visited Mar. 19, 2007).
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45. For a discussion of the PSI, see Stuart Kaye, *The Proliferation Security Initiative in the Maritime Domain*, in *id.* at 141.
46. For a discussion of the RMSI, see Yann-huei Song, *Security in the Strait of Malacca and the Regional Maritime Security Initiative: Responses to the US Proposal*, which is Chapter VII in this volume, at 97.
47. Vijay Sakhujia, *Securing Maritime Landscape in a Post-9/11 World* (Jan. 31, 2005), <http://203.201.253.16/cms/sites/orfonline/modules/strategictrend/StrategicTrendDetail.html?cmaid=1903&mmacmaid=1904>.
48. David Rosenberg, *Dire Straits: Competing Security Priorities in the South China Sea* (Apr. 13, 2005), <http://www.zmag.org/content/showarticle.cfm?SectionID=17&ItemID=7632>.
49. 1982 LOS Convention, *supra* note 13, art. 101.
50. James Henry Bergeron, *Piracy and the Law*, JANE'S NAVY INTERNATIONAL, May 1, 2006, at 14.
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PART IV

PUBLIC PERCEPTION AND THE LAW

IX

Piercing the Fog: National Security, Media and the Government

Harvey Rishikof*

Introduction

At the Naval War College's 2006 Global Legal Challenges conference, I sat as a member of the Public Perceptions Under the Law panel. The panel was charged with the following questions:

1. How does the media shape public perceptions of the law? Does the media generally shape such public perceptions in an accurate way? Does the media understand the law well enough to accurately inform the public of legal issues—and the related law—surrounding such issues? Does the media have an obligation to understand—and then provide an accurate recitation/analysis of—such law? Is there any responsibility on the part of the government to “educate” the media concerning legal issues and the law?
2. Do public perceptions of the law ever serve to help shape national policy decisions? Should policy makers be attuned to the public's perception of the law affecting a particular legal issue? Or, can policy makers effect

* Chair, Department of National Security Strategy and Professor of National Security Law, National War College, Washington, D.C. The views expressed in this article are those of the author and do not reflect the official policy or position of the National Defense University, the National War College, the Department of Defense or the US Government.

decisions on the basis that the “national interests” concerns of the American populace will often outweigh its concern as to whether certain US actions are—or are not—lawful?

3. Is the general public generally well or ill informed on legal issues? Should the government play an active role in “educating” the public on such issues through the media? For example, should the government act to correct an incorrect media analysis of the law affecting a current event? Does the government itself have a responsibility to accurately reflect the law? That is, to what extent should the government advocate a particular analysis of a legal issue when there are clearly differing views of the applicable law? Is the American public’s view of/respect for the law affected by its perception of its elected representatives’ “respect” for such law?
4. What role do other “players” in the international community play in shaping the public’s view of the law, that is, the Arab, the Israeli, the British, the Chinese, the Russian and Korean street? How?
5. What role should academia play in “educating” the public on the law? Should academia see itself as a counterweight to any governmental attempt to “shape” the public’s perception of the law? Is this a productive—or divisive—role that academia might play?

My article answers these provocative questions in four parts: The Media—Profession or Business?; Government and Media: Public Law Diplomacy—Facts and Fictions; The International Community and the Public: The Image Struggle; and The Academic Community—The Proper Role? My goal is to provide perspective on the issues and raise some provocative points for future discussion and analysis.

The Media—Profession or Business?

The media is a critical shaper of public opinion about the law. But the definition of media has evolved. In the modern era we have become inundated with law and media from general press publications, specialized press publications, general television shows, *Court TV*, movie documentaries, “mockumentaries,” Hollywood movies, fiction thrillers, news magazine shows (e.g., *Frontline*), websites and, the newest, the blogosphere. Since legal opinions on complicated subjects can easily be 50 to 100 pages in length, the logic of legal opinions are hard to summarize for the general public. In the end, the final result of some cases is clear—guilty or not

guilty, constitutional or not constitutional. Many other cases, however, are much more subtle and deal with the nuances of congressional fact-finding and the deference owed to judicial review. These cases construe the inner workings of separation of power, federalism and/or political power. Easy and facile summaries usually distort the meanings. Increasingly fact and fiction, entertainment and education merge, and the lines between advocacy and information blend and blur.

In many cases involving the Supreme Court, there may be vigorous dissents and multiple concurrences in the majority. Sorting out the holding or the center of gravity of the logic of the analysis can be challenging. Television commentators are usually given two or three minutes to explain the case. Print media has more space, but, unless the case addresses a “high-profile” issue, there is immediate coverage the day the opinion is handed down, and then little follow up editorial discussion. Perhaps the Sunday papers will have a more in-depth analysis or the Sunday talk shows will take up the issue. Although law reviews remain the serious vehicle for the legal academic community, their style and format condemn them to the rarified communities of law students and professors.

Occasionally a “news magazine show,” e.g., *60 Minutes*, will do an extended 20-minute segment. These shows will help shape the “general” sense of the meaning of the case or issue. Increasingly, websites and blog pages have become, by default, the place of extended commentary, analysis and focus. But this, in the end, is a limited conversation among a select group of the “legal elite chattering class.”

What is the media’s obligation or responsibility? To my mind, this is a tricky question. As a first proposition, and at the risk of being overly controversial, let us conceive of the media as a business, not a profession. Reporters, journalists and producers work for corporations that need to sell their products. Print media is under severe attack by the new emerging technologies. Print reporters for national papers, magazines, blogs and journals have gained personal reputations and followings. Some media or commentators claim to be “neutral” in their reporting and analysis; others clearly reflect a bias or viewpoint and write with a “spin,” e.g., “Activist liberal judges are rewriting the Constitution and should be impeached.” Particular commentators stand out and have become “opinion makers.” Their assessments carry weight, and often in conversation one notes the dialogue: “Did you see X’s (column, commentary or blog)? Do you agree?” Their influence turns on a number of factors—quality of analysis, accuracy in reporting, position in the media, insightfulness and clever commentary. The marketplace determines their influence; some markets prefer reinforcement, others accuracy and some satire, e.g., *The Daily Show*.

Rather than a “profession,” however, the media are more akin to skilled artisans, writers and performers commenting on the law and legal events, giving

perspectives and views. Although there is some distinction between the “op-ed” section and “news” sections of the media, increasingly the market place is eroding what once was an arguable separation. The obligation of the media is to “inform.” There is no constitutional or statutory requirement for “accuracy or analysis.” Reporters are not sanctioned or regulated by the State and are not disbarred from the profession—no one can arrest them for practicing without a license. In fact, the First Amendment protects the media/press function from the preying regulatory interests of Congress:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Both rumor and fact are protected by the speech and press clauses. Lawyers and doctors have no such protection—imagine if they did? Albeit there are libel suits, but for public figures the bar is high. The concept of “if it bleeds, it leads” is alive and well in the United States. Moreover, US news and commentary crowds out news from other parts of the world.

War correspondents have a particular challenge. Reporting the truth may damage the war effort. Revealing military mistakes undermines confidence in the overall ability of US forces. Yet once embedded with the troops, the identification with the effort and the fact that the troops are protecting the reporter has to have an effect. Giving the “soda straw” perspective is powerful, immediate and visceral, but is it relevant to the grand campaign? Finally, a hard professional question for the US media is the following hypothetical. Imagine a situation whereby Osama bin Laden contacts a US reporter and offers an exclusive interview to tell his side of the story in a third country location—not in the United States or in Iraq. Would a US reporter contact the military to tell of the offer? Would the US reporter agree to have a “global positioning” chip embedded in or on his person? Would a foreign journalist, offered the same opportunity, make the same choices as the US journalist? Are US reporters reporters, US nationals or professionals?

Government and Media: Public Law Diplomacy—Facts and Fictions

Faced with a media that is a business and a First Amendment that protects the informing function, broadly defined, how should a government respond? What is the government’s role in the public perception of the law? Should the government play an active role in “educating” the public on such issues through the media? For

example, should the government act to correct an incorrect media analysis of the law affecting a current event? What is the appropriate role for the government in responding to the shaping of the legal message for the public?

First, the concept of government must be defined. Our government is composed of the executive, legislative and judicial branches. Historically, the federal judicial branch has not involved itself in public information or public diplomacy campaigns. State judges, some of whom compete for public office, have been more “active” in explaining themselves during election periods. US federal judges, however, have been unique in the restraint they have shown as controversy mounts about the role of federal judges or the interpretation of an opinion. Although judges have written books, articles and law reviews, they rarely consent to be interviewed and refuse to comment on current cases. Often is heard the refrain, “The case speaks for itself.” This is not true in all legal jurisdictions. In Canada, for example, the Administrative Assistant to the Chief Justice will hold press conferences to explain the meaning of a case recently handed down. This would be unprecedented in the US federal system.

Judicial independence is protected by bar associations, nongovernmental organizations, think tanks and law schools speaking on behalf of the judiciary. In fact, attacking judges’ independence has been a recurring historical phenomenon in the United States and public opinion heretofore has been mobilized to prevent other parts of the government from disciplining the courts. The defeat of the proposed Franklin Delano Roosevelt “court packing” plan in the 1930s resulted in even more independence being granted to the judiciary.¹ Prior to the failed plan, the judiciary submitted its budget through the Department of Justice and the Attorney General of the United States. Once the plan was defeated, Congress passed legislation so that the judiciary submits its budget independently and directly to Congress through the Office of Management and Budget.

This leaves the executive and the legislative branches. It is often the case that the government is divided, with one party controlling the presidency and the other controlling one or both houses. The legislature, with its power to hold public hearings, can address judicial opinions directly with extensive deliberations. Scores of witnesses—experts, pundits and academics—can be called to testify even under oath and render their opinions about critical legal issues. A legislative record is created, and these proceedings are covered by the media and commented upon. Virtual media frenzies can be created with daily interviews, stories and gavel-to-gavel coverage of high-interest committee hearings.

Senators and members of the House of Representatives have enormous power to shape the public debate through this process. The legislature can fill the public space with interviews, studies and research papers and conduct behind-the-scenes

lobbying and negotiating with the executive branch. In fact, members of the executive branch can be subpoenaed and forced to testify about events, positions and views. Although the President can invoke executive privilege, the Congress, public and media carefully scrutinize such tactics.

The executive has an enormous array of tools at its disposal to “spin” legal issues and positions taken by the President. It is now a well-established Sunday morning ritual to have the President’s men and women fan out across the talk shows with the same song sheet and present the White House position. The President’s press conferences and ability to address the nation from the Oval Office, to “go directly” to the people over the heads of the media, is a powerful tool to influence the debate on legal policy issues. Pronouncements on legal issues by the President carry significant weight since it is assumed the leading legal minds of the administration have researched those issues and support the positions being taken.

Recently the prosecution of “leaks” of even high-ranking government officials and the subpoenaing of reporters by US attorneys for the identity of sources have demonstrated a new weapon by the executive to control the flow of information. The revelation by syndicated columnist Robert Novak of Valerie Plame Wilson as an undercover CIA officer, and the subsequent investigation by the US Attorney for the Northern District of Illinois, Patrick J. Fitzgerald, involving I. Lewis “Scooter” Libby, Vice President Dick Cheney’s former chief of staff and national security adviser, and the holding of Judith Miller of the *New York Times* for contempt in not revealing her source is clear evidence of the executive’s power to shape the terrain for the flow of information.

Moreover, the prosecution of the American Israel Public Affairs Committee’s (AIPAC) director of foreign policy, Steve Rosen, and an Iran specialist, Keith Weissman, in addition to Lawrence Franklin, an Iran analyst at the Department of Defense (DoD), will be the first time the federal government has charged two private citizens with leaking State secrets. According to the indictment, Rosen and Weissman repeatedly sought and received sensitive information, both classified and unclassified, and then passed it on to others in order to advance their policy agenda. In the case, it is alleged that Rosen and Weissman received the information from a DoD official, Franklin, who wanted the information passed on to other officials. For some legal experts, the prosecution threatens political and press freedom by making the flow of information and ideas a crime. Federal prosecutors are using the Espionage Act for the first time against Americans who are not government officials, do not have security clearances and, by all indications, are not a part of a foreign spy operation. The prosecution of the strategic leak whereby one part of the executive charges another part of the executive raises the question of who is using whom in the process of shaping opinion.

The press and the legal communities are carefully watching these cases to see how the courts will strike the balance between leaks, information flow, national security, the First Amendment and the right to know. The resolution will help shape the debate for the future.

The International Community and the Public: The Image Struggle

What role do other “players” in the international community have in shaping the public’s view of the law—that is, the Arab, the Israeli, the British, the Chinese, the Russian and Korean street? The issue of the public is best understood in the context of public diplomacy to include the several publics involved, for example, in the War on Terrorism (US, European, Afghani, Iraqi, other Middle Eastern). Since 9/11, the US public’s approval rating for the Iraqi conflict has steadily trended downward from 90% to about 40%. The world media are central to shaping public perceptions, but the expectation that the media will simply be “fair” is misplaced. How much the US public is affected by foreign press is unclear. *Al Jazeera* loops pictures of noncombatant Palestinians being killed by Israeli forces and then cuts to US forces in Iraq and noncombatant Iraqi corpses. The number of Iraqi dead is still not fully reported in the US media, but the world community opposed to the war focuses on the civilian casualties. The world media approaches the subject with its own views and that is the way it is and should be.

Covering the war by leaving Baghdad’s Green Zone is a dangerous enterprise. According to *Reporters Without Borders*, the war in Iraq has proved to be the deadliest for journalists since World War II. As of November 2006, a total of 135 journalists and media assistants have been killed in Iraq since the war began on March 20, 2003. This is more than the number killed during 20 years of war in Vietnam or the civil war in Algeria. Iraq is also one of the world’s biggest marketplaces for hostages, with 38 journalists kidnapped in three years. Five of them were executed. Three are still being held by their abductors. Around 63 journalists were killed in Vietnam during the 20 years from 1955 to 1975. A total of 49 media professionals were killed in the course of their work during the war in the former Yugoslavia from 1991 to 1995. During the civil war in Algeria from 1993 to 1996, 77 journalists and media assistants were killed.²

One can have only admiration and deep respect for those reporters and commentators willing to sacrifice their lives to tell the story of Iraq. Informing the public accurately on legal issues emanating from the conflict is even more problematic, especially given the growing gap between US and European views on relevant international law questions. The gap is largely a topic of conversation among elites, however, and the participation of the media and the public is not central. The 2006

US election demonstrates, however, that the status of the war affected the American people and coverage and commentary was critical.

But there are critical cultural differences between the United States and the world. Europe, for example, believes that the death penalty is a violation of human rights while the United States and the Supreme Court hold that the death penalty is part of US culture and heritage. In this sense, “soft power,” as understood by Joseph Nye,³ is not effective if the message runs counter to world opinion.

Legal commentators are a new, vibrant phenomenon; they and other shapers of public perceptions are delivering information very rapidly and in ever-new ways technologically. Commentators on the blogosphere now have tremendous power, as do the dominant images that ultimately become adopted as emblems of a conflict in the public consciousness. Which picture will be the iconic emblem of the war—the statue of Saddam Hussein coming down? Or the hooded detainee from Abu Ghraib? Or the pictures of the long lines of a free and democratic Iraq voting?

For Vietnam, the pictures of Saigon police chief Nguyen Ngoc Loan’s raised pistol to the temple of a suspect and of the young girl, Kim Phuc, who ran naked from the napalm attack on her village became the public’s images of the war frozen in the minds of the US population.

These pictures of Vietnam captured what appeared to be violations of international law, and became metaphors, right or wrong, for the war. Reality may be very different from the image or perception. Recently, Dominic Johnson and Dominic Tierney have argued that the Tet offensive of January 1968 was actually an unmitigated disaster for the communists (no targets were held and approximately 40,000 Vietcong were killed), but the attack was viewed as a defeat for the United States due to the previous overblown expectations of public opinion that victory was near following President Johnson’s expansive rhetoric before the offensive, the fact the US embassy was placed under direct fire, and the way the media portrayed the offensive and the Vietcong resurgence.⁴ The fog of battle can cloud press coverage and portrayal. As has often been noted, truth is the first casualty of war. Perception is critical. When the stakes are high, however, and pictures and facts of casualties contradict the government’s portrayal of reality, the public’s mood can swing dramatically, particularly in election season.

The Academic Community—The Proper Role?

What role should academia play in educating the public on the law? Should academia see itself as a counterweight to any governmental attempt to shape the public’s perception of the law? Is this a productive—or divisive—role that academia might play?

The academic role in educating the public is often equivocal: the academic search for long-term truths and guiding principles does not often yield information that readily impacts public perceptions. Increasingly, academics are flooding the airwaves, blogs and documentaries, and giving on-the-spot commentary. The O.J. Simpson trial began a trend that has continued in force. From the perspective of John Stuart Mill, this is all good—the more speech in a democracy the better. Let the marketplace of ideas sort out the cacophony of voices. Often the same “usual suspects” show up for the pithy quote in the article by the well-known journalist or commentator. (I must confess to pleading guilty on this charge.) Other academics have chosen to start their own blogs where they keep a running commentary on the legal issues that fall under their expertise. It is only a question of time before the Supreme Court cites a blog as a source of authority for an opinion.

Independence and tenure give academia a special voice in the legal debates. When the legal community uniformly disagrees with the government’s position, it has an impact on the public’s sense of propriety. How much impact is unclear. Moreover, the most significant question is what effect the community has on the court deciding the issues. Are judges or justices swayed by *amicus* briefs from respected members of the legal community overwhelmingly agreeing on a position? More often than not, the community will be divided, with respected voices on both sides of the “vs.” The judge’s own independence is the final arbiter, not the academic community. The academic community acts more like a searchlight illuminating the different paths. The court must choose the route, and then be held responsible.

Conclusion

So where does this leave the debate of national security, media and the government? Piercing the fog of confusion is never an easy task. Essential to our democracy is open debate. Our cacophony, like our democracy, is the best approach given the alternatives. Unlike the United Kingdom, the United States has no Official Secrets Act,⁵ although the combination of the Title 18 provisions criminalizing fraud and related activity in connection with computers⁶ and the State-secrets privilege, tied to prosecutions under the Espionage Act,⁷ brings such a regime closer. Faced with such a threat, some have called for a federal shield law for reporters and Senators Richard Lugar, Arlen Specter, Christopher Dodd and Charles Schumer sponsored the Free Flow of Information Act of 2006.⁸

Until such time when such a United Kingdom approach takes hold, our system remains one of no prior restraints, few media regulations (e.g., the Federal Communication Commission), private law suits for defamation, a private multi-faceted

media, an independent legal system, unregulated new worldwide technologies of communication, a ship of State that “leaks” from the top and a literate audience. True, it is an audience more interested in *Monday Night Football*, *Judge Judy*, *The Daily Show*, and *Dancing with the Stars*, but it is an audience that has the right and the ability to engage and become involved if it so chooses. We call it, in short, freedom of the press. Warts and all, the best remedy is more commentary, to paraphrase John Stuart Mill.

Notes

1. FDR allegedly presented the Judiciary Reorganization Bill of 1937 to relieve the workload of elderly judges. The bill would have allowed FDR to appoint one judge for each sitting judge over age 70 and six months with at least ten years of experience. FDR could have appointed six more Supreme Court justices immediately, increasing the size of the court to 15 members. A Congress dominated by Democrats would have been expected to appoint judges friendly to FDR and his New Deal agenda. The measure was opposed by senior leaders of the Democratic party and defeated. Controversy still surrounds the reason why Supreme Court Justice Owen Roberts changed his vote, prior to the bill’s defeat in Congress, on a minimum wage law, but his vote became known as “the switch in time that saved nine.”

2. This information is compiled from the *Reporters Without Borders* website. See http://www.rsf.org/special_iraq_en.php3 and http://www.rsf.org/article.php3?id_article=16793 (both last visited Dec. 27, 2006). The numbers of journalists and media killed in Iraq are continually increasing. For example, by December that figure had risen from 135 in November to 139.

3. See, e.g., JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

4. See Dominic Johnson & Dominic Tierney, *The Wars of Perception*, NEW YORK TIMES, Nov. 28, 2006, at A23.

5. Official Secrets Act, 1989.

6. 18 US Code sec. 1030 (2000).

7. Public Law No. 65-24, 40 Statutes at Large 217 (1917).

8. S. 2831, 109th Congress (2006).

X

The Military and the Media in Perspective: Finding the Necessary Balance

James P. Terry*

In reviewing the recent events in Iraq and the War on Terrorism vis-à-vis the media, the one obvious question asked by all Americans today, including those in military service, is who do the media represent. Do they represent the voice of the American people, or do they represent a defined elite concerned with a change in the political landscape in the United States?

Recent Background to Current Contentiousness

Two recent incidents, I believe, are indicative of the current unease between the military and the media and force us to reflect on who and what the media represents in their reporting on military activities. In early 2005, *Newsweek*, owned by the Washington Post Company, published a story by Michael Ishikoff claiming that a copy of the Koran had been flushed down a toilet by an American interrogator at Guantanamo, Cuba, in front of Muslim interviewees. When evidence was produced that showed it to be false, *Newsweek* belatedly retracted the story but only after much damage to the US military's image occurred in those countries with whom we must cooperate in the War on Terrorism.¹ More importantly, the rioting that followed resulted in 16 deaths in Afghanistan and elsewhere. *Newsweek*,

* Colonel, United States Marine Corps (Ret.).

moreover, wanted no part of the White House's request that it help repair the damage. And, unfortunately, no journalist from any major news organization wrote that they should.

The current reporting of the Haditha story also bears mentioning. The rush to judgment of the Marines involved by the US media without waiting until the facts are determined has been viewed by many as simply reflective of the media's tendency to believe the worst. More significantly, the fact that the incident was reported immediately to superiors by the Marines involved, that those in command were made aware of the civilian deaths contemporaneous with the incident, and that the squad involved has consistently claimed that they followed their rules of engagement in clearing the buildings from which they took fire, have all been conveniently overlooked by the mainstream media in their reporting. More importantly, there has been no investigative reporting on standard procedures for clearing buildings from which fire is taken and no interest in reporting the context in which these deaths occurred.

What is most difficult to understand is *why* the press, most of whom have not served in the military, so often chooses to believe foreign sources proven incorrect in the past, and disregard the voices of fellow Americans who are daily placing themselves in harm's way for our nation's foreign interests. Military lawyers also ask why the press ignores the basic legal principles that apply in irregular belligerencies where unlawful combatants are engaged with national forces—in this case coalition forces and forces of the new Iraqi government. We must also ask why there is such a bent to discredit and criticize US efforts rather than understand the rationale behind coalition actions aimed at ensuring we can “stay the course” in Iraq and the reasons for the immediate actions in support thereof.

With that said, our charge must be to assess the relationship between the media and the military as it relates to an understanding and articulation of the legal parameters of the current conflict in Iraq as covered by the press—that is, Operation Iraqi Freedom. Our goal should be to increase mutual understanding at both the personal and institutional levels of what the legal regime actually represents with respect to the military's operational requirements in the War on Terrorism and the legal framework under which the current conflict is being pursued. One would hope that the effort here today can help lead to practical solutions to areas of friction in communication between the two. Finally, our ultimate quest must be how can we maintain a vibrant, robust freedom of expression while protecting the nation's capacity to fight our wars effectively.

*The Legal Principles Underlying Irregular Belligerencies:
Often Ignored in the Reporting on Iraq*

The Nature of the Current Violence

As discussed below in detail, the media's use of the now firmly ingrained term, "insurgents," or "insurgency," is both factually and legally incorrect and reflects the media's misunderstanding of the conflict.

The Global War on Terrorism was clearly not contemplated when the four Geneva Conventions, addressing wars between national entities, were signed in 1949.² The violence in Iraq currently perpetrated by al Qaeda and elements of the former regime is being spearheaded by individuals under no known national authority, with no command structure that enforces the laws and customs of warfare, and with no recognizable, distinguishing military insignia. More importantly, they represent no identifiable national minority in Iraq. Their attacks have injured and killed civilians of all ethnic groups, as well as more than 2,500 US military personnel attempting to assist the democratic government in Baghdad to succeed. Their use of children and women as lookouts and information gatherers is reminiscent of Vietnam and raises serious questions about the status of those individuals when acting on behalf of terrorist fighters in Iraq. The fact that this status is seldom, if ever, acknowledged by the press raises serious concerns for the military in their efforts to assure the public of our adherence to the law of war.

It is important to understand that terrorist violence provides no legal gloss for its perpetrators. The critical international law principles applicable to the violence in Iraq are found in the 1949 Geneva Conventions in Common Article 3³ relating to internal armed conflicts and the principles enunciated in the two Additional Protocols to these Conventions negotiated in 1977.⁴ The minimal protections afforded by Common Article 3, for example, include prohibitions on inhumane treatment of noncombatants, including members of the armed forces who have laid down their arms. Specifically forbidden are "murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment," and extrajudicial executions. Provision must also be made for collecting and caring for the sick and wounded.

The 1977 Geneva Protocols had their roots in wars of national liberation following World War II. Colonial powers, to include the United States, France, Great Britain, and the Netherlands, had engaged these liberation movements militarily, often with little regard for the law of armed conflict. In the 1974 conference hosted by the Swiss government in Geneva, the need to regulate conflicts of a non-international character was addressed in Article 96(3) of Additional Protocol I and is the subject of Additional Protocol II. At the conference, the Swiss

Government invited members of national liberation organizations to participate, but not vote.

The participation of non-State actors helped shape the drafting of Article 96, paragraph 3 of Additional Protocol I. This section provides that a party to a conflict with a State army can unilaterally declare it wants the 1949 Geneva Conventions and the 1977 Protocols to apply. This would, of course, offer greater protection for members of national liberation movements. Under Article 96, however, parties authorized to make such a declaration had to establish that they were involved in “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”⁵ In Iraq, however, terrorists are trying to unseat the government that has been overwhelmingly approved by the people. Moreover, al Qaeda has made no statement that it desires the Geneva Conventions to apply.

These terrorists, or unlawful combatants, however described, have no juridical existence other than as common criminals. Additional Protocol I, Article I conflicts, or those between a nation and a recognized insurgency seeking a legal status, differ from the present terrorist violence in that participants in Article I conflicts opposing government forces are required to meet certain minimum requirements. These are: (1) that they operate under responsible command and are subject to internal military discipline; (2) that they carry their arms openly; and (3) that they otherwise distinguish themselves clearly from the civilian population.⁶ In return they are accorded certain protections when captured. It is doubtful that those perpetuating violence in Iraq today meet these criteria for the status of insurgent. Moreover, they are exploiting every ethnic group for their own vicious ends, without regard for these requirements.

The fact that these terrorists have no recognized and protected status under the Geneva Conventions or their Protocols, and employ methods completely banned by the laws of armed conflict, is likewise seldom articulated by mainstream reporters. In addition, al Qaeda’s failure to adhere to the most basic tenets of international law on the battlefield is never addressed. What is addressed is every claimed violation of the law by American service members, often responding to acts of savagery by Muslim extremists claiming to act on behalf of Allah, not on behalf of a national or sub-national entity. The fact that these claimed violations of the law of war by Americans are often subsequently found to be without substance seems to never appear in print.

The Status of the Al Qaeda and Other Anti-Government Participants

While the press today insists on calling these terrorists “*insurgents*,” the fact that they are the basest of criminals, and not insurgents with minimal juridical status

under Article I, Protocol I, as discussed above, is never recited. The fact that they do not represent even a significant minority of the Sunnis, Shiites or Kurds is never explained. (We know this because 70% from all sectors voted in the December 2005 elections for a democratic government.) And there is never a call in the press for the Iraqi people to stand up and denounce these perpetrators of violence who are even now sucking the lifeblood from the fledgling Iraqi Government.

The law of armed conflict is based largely on the distinction between combatants and noncombatants. Unfortunately, in Iraq, the clear distinction normally witnessed in conflict (i.e., belligerents on the one hand and the civilian populace on the other) is significantly blurred. Nor are all elements that are perpetuating the violence today working toward the same ends. Baathist operatives within the Sunni elite who were formerly within Saddam's inner circle are trying to prevent the fledgling democracy from succeeding. The al Qaeda leadership is focused on driving the Western influences from Iraq and it is likewise targeting any supporters of the current coalition effort to help the new Iraqi government sustain democracy. Certain members of the Shiite leadership have used the turmoil as an opportunity to settle scores while at the same time refusing to commit completely to the new regime until it is determined that it can succeed. Shiite religious leaders like Sistani are remaining silent. The Kurds have opted to remain on the sidelines in the north and take a wait and see approach while at the same time ostensibly supporting the new regime. Then there are the local rivalries, and in Iraq, all politics are local. I saw that in Fallujah in late 2004 and in early 2005 when I was there on behalf of the Secretary of State.

The point is that the Marines under scrutiny at Haditha responded to attack in a very complex environment. The key question had to be whether they followed the legally scrubbed rules of engagement and, equally important, whether the rules of engagement followed, if in fact they were followed, actually applied to the facts on the ground as they presented themselves to the Marines involved. Major General Bargewell, the investigating officer, is now carefully examining these questions on behalf of the Secretary of Defense.

These cross currents, and the fact that our Marines and Army forces are dealing with a period of carefully orchestrated violence, need to be more accurately portrayed by the media. The fact that individuals, including women and children, who participate actively and directly in support of combat activities (such as providing combat intelligence, physically shielding combatants, etc.) themselves become combatants and are legitimate targets of attack, needs to be explained. That is why it is so critical that reporting on events such as the Haditha killings receive careful review and careful attention.

Finding the Appropriate Military-Media Relationship

We must ask then, what is the appropriate balance in reporting in the current struggle in Iraq? How can the media report events in a more accurate way? What can the military do to provide the legal insights necessary for the media to fully understand the operational legal issues that have and will arise? There is no question that public perceptions of the law and, more specifically, perceived violations of the law shape national policy decisions. This was never more true than in Vietnam, where the My Lai murders helped to sour the Vietnamese public on our continued presence there, and the US public on our continued participation in that conflict.

In the present conflict in Iraq, the allegations concerning the alleged murders at Haditha and other similar incidents are even now shaping national policy decisions. It was no accident that when President Bush visited Baghdad on June 13, 2006 he met with the new Iraqi Prime Minister and expressed support for continued US presence on the one hand, while urging the Iraqis to move quickly to train their own forces and to take the lead in their own defense.

There is also no question that the climate under which the military and the media operate has intensified since September 11, 2001. A 2005 Gallup Poll found that large majorities of both the military respondents and the public believe that news stories about the military tend to be too negative.⁷ Members of all three groups, military, media and the public, however, believe that embedding the media within the operational forces enhances the public's understanding of the war, helps the morale of the troops, improves the public's perception of the military and improves the credibility of the media coverage. It is the *understanding* which flows from embedding, not mere information, which makes the difference between fair coverage and something less.

The Practical Effects of Embedding

It was during the Bosnian peacekeeping operation in 1995 that reporters were first authorized and assigned to accompany US forces as part of an authorized comprehensive program. This was short-lived, however, as a sensitive conversation between a commander and his men concerning racist attitudes of one of the Balkan parties to the conflict was reported by a *Wall Street Journal* reporter (Tom Ricks). The program was robustly adopted, however, by US military commanders in Operation Iraqi Freedom in 2003. The more than 600 reporters who were approved for the program received a week-long "boot camp" of sorts aboard ship and at sites such as Marine Corps Base Quantico, Virginia; Fort Dix, New Jersey; and facilities

in Kuwait.⁸ *New York Times* journalist Andrew Jacobs found it to be “alternatively enlightening, entertaining, horrifying, and physically exhausting.”⁹

While nearly all reporters involved in the program during Operation Iraqi Freedom believed it gave them a greater feel for the war and a better understanding of the military as a result of their training and experience, there were concerns by publishers that negative stories by embedded reporters never caught the public’s attention. These included stories of failed supply planning, civilian casualties, fratricide and theft. I believe that this lack of traction for negative stories can be largely attributed to the overwhelming success of the initial campaign and the belief on the part of most Americans that the coalition force had done a remarkable job, despite the reported negative events.

While the embedding program was not institutionalized during Vietnam and earlier, one only has to recall the excellent reporting of Ernie Pyle in the Pacific during World War II to understand that the embedding of individual reporters has a long and proud history. In Vietnam, Joe Galloway, who subsequently wrote *We Were Soldiers Once*, with Major General Hal Moore, spent 25 years traveling “up close and personal” with military units—primarily Marine and Army infantry commands. It was his reporting in the Ia Drang Valley (pronounced Na Trang) in November 1965 with an Army Battalion of the 1st Cavalry Division facing overwhelming odds which catapulted him onto the world stage. Galloway described his feelings on his reporting this way:

There, in the mud, is where war is most visible and easiest understood. There no one will lie to you; no one will try to put a spin on the truth. Those for whom death waits around the next bend or across the next rice paddy have no time and little taste for the games that are played with such relish in the rear. No one ever lied to me within the sounds of the guns.¹⁰

The commitment by the media to embedding their reporters in Iraq has now waned. While at one time several hundred reporters were assigned to operating units, today that number stands at no more than 25. More than 40 media personnel, to include reporters, cameramen and assistants, have perished in attacks during the War on Terror. When a newsperson is attacked, as has happened recently in the case of Bob Woodruff and others, the story becomes their injuries and their prognosis and not that of the American servicemen who may have died in service to his or her nation while providing them protection. That aspect of the military-media relationship and the related reporting has not been ignored by the American people.

What marked the initial success of the embedding process, in my view, was the fact that the additional experience and training provided these reporters enabled

them to turn the situation into an educational opportunity for their audience. Through their understanding of the events in the context of the operational requirements of the conflict, they were less likely to resort to quick criticism, “gotcha” reporting and wildly negative predictions. As Navy Commander Brendon McClane has suggested in an excellent recent article in *Parameters* magazine, the next step should be to bring trusted reporters into the operations center to gain a needed context for their stories.¹¹ While this would have to be carefully tailored depending on the conflict and the sensitivity of the information, one can reasonably conclude that reporters like Rick Atkinson, Major Garrett and Ted Koppel, with a long history of trust by commanders, would be likely first candidates.

Access to the operations center would also give access to an understanding of the rules of engagement approved for and employed by the force involved. Rules of engagement, although highly classified, nevertheless provide the legal and operational roadmap for our military’s response to attack, both geographically and with regard to weapons systems and procedures. The understanding of these approved operational procedures, which are trained to by our forces, would preclude unfounded claims of violations, because these rules are drafted after careful review of the legal restrictions applicable and after a careful review of the combatant status of individuals engaged. When a civilian woman or child is acting as a combatant, the fact that the individual no longer enjoys civilian protections should be understood by every journalist reporting the story, even if that fact is personally distasteful. When a civilian family is harboring a terrorist in their house who is firing on US troops serving in Iraq and representing the interests of the democratically elected government, as is alleged to have happened at Haditha, the reporters need to know that the home is no longer a protected place but has become a safe haven for the enemy. These are the basics, but they often seem not to be within the lexicon used by the fourth estate.

When we have reporters who understand the law, have good judgment and have integrity, their reporting tends to be clear, more accurate and in context. When they do not exhibit these traits, their reporting can be misleading and worse, it tends to frustrate the military and, as we witnessed after Vietnam, preclude an effective dialogue in future military engagements.

Notes

1. See Howard Kurtz, *Media vs. the Military*, WASHINGTONPOST.COM, May 23, 2005, http://www.findarticles.com/p/articles/mi_m0NTQ/is_2005_May_23/ai_n13810168 for an insightful discussion of how this unfounded report and the similar inaccurate reporting by Dan Rather on *60 Minutes Wednesday* in late 2004 concerning President Bush’s Air National Guard service have soured many Americans on the credibility of the press with respect to military reporting.

2. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [Geneva Convention III]; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [Geneva Convention IV], all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000), at 197, 222, 244 and 301, respectively.

3. The text of Common Article 3 may be found in *id.* at 198.

4. Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, and Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, *reprinted in id.* at 422 and 483, respectively.

5. See discussion in Waldmar Solf & Edward Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, CASE WESTERN RESERVE UNIVERSITY JOURNAL OF INTERNATIONAL LAW, Spring 1977, at 205.

6. DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 423. Article 1(2) of Protocol I states that “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” *Id.*

7. The Gallup Poll conducted in 2005 showed a comparison of public perceptions and the changes that have occurred in the military-media relationship since a similar poll was conducted in 1999. The complete Gallup Poll results can be found at <http://www.mccormicktribune.org/journalism/militarymedia2005.pdf#search=%22site%3Awww.mccormicktribune.org%22> (last visited Aug. 24, 2005).

8. See Mark Mazzetti, *Dispatches from Media Boot Camp*, SLATE, Nov. 18, 2002, <http://www.slate.com/id/2073993/entry/2074127/> (with the Navy); Mark Mazzetti, *Dispatches from Media Boot Camp*, SLATE, Nov. 20, 2002, <http://www.slate.com/id/2073993/entry/2074330/> (with the Marines).

9. Andrew Jacobs, *My Week at Embed Boot Camp*, NEW YORK TIMES SUNDAY MAGAZINE, Feb. 3, 2003, at 34–35.

10. Joseph Galloway, *The Military and the Media: One Man’s Experience*, Address Delivered at the US Army War College (2001), recounting experiences from Ia Drang Valley in Vietnam (on file with author).

11. See Brendon McClane, *Reporting from the Sandstorm: An Appraisal of Embedding*, PARAMETERS, Spring 2004, at 77.

XI

National Security, the Law and the Media: Shaping Public Perceptions

Linda Robinson*

The American news media play a significant role in shaping public perceptions of national security policies and their legality, and therefore have a great responsibility to carry out their function with the highest possible degree of professionalism. Since the September 11, 2001 terrorist attacks, many complex and sensitive issues involving national security and the law have arisen, which have increased the challenge for the news media to perform its role with diligence and accuracy. Some of the cases reflect inherent tensions between principles of civil liberties, privacy rights, due process and national security; for example when public disclosure and debate can conflict with national security imperatives that may require secrecy for success of a policy that aims to protect citizens. A given policy's legality may be called into question, or there may be no settled law or legal interpretation governing that policy. While media coverage of national security policies can provoke controversy, it can also result in legislative, judicial or executive action to clarify legal gray areas. This has been the case with detention and interrogation policies for those captured in Iraq, Afghanistan, and in connection with the war on terrorism. In some cases, the media is alleged to mislead the public with distorted, partial or erroneous characterizations of national security policies or events. This issue has arisen with regard particularly to the coverage of the war in Iraq. Media

* Senior Writer, *U.S. News & World Report*.

and government practices may contribute to the perception that the “full story” is not being told. Systemic trends in the news media business have made it more difficult in many instances to meet professional standards, which have been traditionally embraced but are not formally codified. Finally, a polarized and partisan political climate in the country has contributed to a public discourse marked by more heat than light.

The press sees itself as performing a watchdog function to protect the public’s interest and to inform the public on the vital issues of the day. It has been a hallmark of the news media to guard its independence and to investigate alleged wrongdoing, particularly on the part of government and those in positions of power. Such a predisposition should not, however, become a presumption of wrongdoing. Journalists should aggressively pursue the facts and let them speak for themselves. When covering national security issues, journalists may encounter dilemmas over handling classified information or information that may provide assistance to those who would do the country harm. While there are certainly many cases where information is overly classified with scant justification, as was acknowledged in the 9/11 commission report,¹ the news media have a responsibility to carefully weigh the consequences of publishing classified information.

Two news stories amply illustrate the challenges of reporting on national security law. The *New York Times* reported that the National Security Agency (NSA) was conducting warrantless surveillance of Americans inside the United States, relying on a classified legal opinion that it was legal to do so when the NSA had reason to believe that the person was in contact with a suspected agent of a foreign power or terrorist entity. The article reported concerns by other US officials that the policy, which was adopted after the 9/11 attacks, violated the 1978 Foreign Intelligence Surveillance Act (FISA)² by not obtaining warrants from the FISA court. The law requires warrants for eavesdropping on “U.S. persons,” but the policy’s legal proponents considered that the executive branch has the authority needed so long as one of the parties was outside the United States.³

In this very complicated case, there is a clear legal gray area that is now under review by the Justice Department, and which was questioned by the head FISA court judge and by some legislators who were briefed on the policy. Technology has also evolved since the 1978 law was written and subsequently amended. Yet the administration did not seek its revision by Congress or judicial review for fear of compromising the secrecy it felt the program required. The *New York Times* withheld publication of some details that the executive branch argued would harm US national security interests, but it disagreed with the government’s contention that the very disclosure of the program would render it ineffective and decided to publish the story.⁴ The extremely sensitive nature of the case led the executive branch to

restrict the explanations it offered to both the public and to Congress. In 2007 the Bush administration decided to submit requests for surveillance warrants to the FISA court rather than contest the legality of its program.

Another news story that generated a great deal of controversy (as well as accolades, for like the NSA story, it too won a Pulitzer prize) was the *Washington Post's* revelation that the Central Intelligence Agency (CIA) had been holding suspected terrorists at secret detention sites in several countries since 9/11.⁵ The policy of extraordinary renditions has been in effect since the previous decade, but in the days after 9/11 the executive branch decided to detain US suspects outside US territory to keep them out of the US courts' jurisdiction. Those suspects have now been remanded to their countries of origin or transferred to Guantanamo Bay Naval Base in Cuba, to a US detention facility run by the US military and monitored by the International Committee of the Red Cross. Court rulings led to legislation establishing new legal processes for detainees, and military policy on interrogation tactics has been changed to explicitly prohibit some of the practices (such as simulated drowning or "waterboarding") allegedly used at the CIA sites.

There has been no determination in the US justice system of the legality of the practices of rendition and secret detention, although some of the detainees are pursuing the matter in court. Investigations were also conducted in Europe, where some of the secret sites were allegedly located. The exposure of a practice in which US and foreign intelligence agencies have cooperated has led to controversy and strains in those countries. The description of alleged coercive interrogation techniques by the CIA also coincided with the ongoing controversy over interrogation and detention practices in Iraq. The abuses of detainees at Abu Ghraib prison in Iraq, as recorded on digital photos that a US soldier turned over to investigators, led to prosecution of some of the US soldiers involved. The photos had already been circulating among soldiers, but the publication and dissemination of them caused widespread outrage and attention to the issue. Investigations and congressional hearings brought to light many of the administrative and policy shortcomings that contributed to the occurrence of the abuses. While the issuance of new rules for detention and interrogation practices may help prevent recurrences and mitigate the perceptions created abroad, the Abu Ghraib scandal and the wide coverage it received remains one of the symbolic events of the Iraq war.

There have been criticisms more generally that the press coverage of the Iraq war has been inaccurate and has undermined Americans' support for the war. In addition, US officials have been frustrated in their efforts to respond to the very effective use of media by adversaries in Iraq and in the al Qaeda movement. Their pronouncements and their videotapes of attacks on US soldiers or of their captives quickly find their way onto the Internet and the airwaves, enabling the

adversaries to disseminate their message and, in many instances, give the first account of events.

Regarding the quality of American news coverage of the war in Iraq, the allegation of bias in coverage can be partly attributed to a “shoot the messenger” phenomenon, since the war effort has been bedeviled by numerous setbacks and errors of commission and omission. In this reporter’s judgment, however, the media can also be fairly criticized for emphasizing violent attacks over less salacious and often positive events such as reconstruction efforts. But the more serious lapses have occurred either through media ignorance of military affairs or a failure to seek and weigh all the relevant data and analyses to produce in-depth, comprehensive examinations of the war’s conduct. The public policy debate would greatly benefit from more sustained efforts to understand what is an extremely complicated conflict that has eluded easy answers.

The US government, including the US military, has lamented that it is losing the “battle of ideas” and that it often has a much longer response time than its adversaries. Frequently, the decision-making chain regarding release of information is long and cumbersome. Yet the military in particular has adopted some effective policies that help provide news media with access to the battlefield, senior officials and other events and voices that merit coverage. Embedding media with military units has provided journalists with firsthand information that they cannot obtain elsewhere. While the process of embedding media has been criticized by some as a means to control journalists, in this reporter’s experience, the ground rules imposed primarily restrict the timing of news dispatches to protect operational security and, in some instances, specific tactics whose effectiveness would be compromised by detailed description. In any event, embedded reporting provides one avenue for reporting and should not be the sole means of news gathering. US commanders have in some cases taken extraordinary steps to provide access or information, allowing selected reporters wide access to battlefields and commanders’ deliberations. In one case the commander of the Multi-National Force–Iraq released video footage of a Predator that was tracking insurgents in order to provide fuller news coverage of an attack on the US embassy in Baghdad, when the partial coverage had led the news media to dwell on the attack even after its perpetrators had been identified and apprehended.⁶

Providing more access and information often helps the press produce better informed and more in-depth coverage and analysis, provided that it invests the necessary time to take advantage of the opportunity for sustained research. Unfortunately, many pressures within the news business today militate against such “best practices.” At times the news media is driven by competing pressures, and while journalists should

always insist on the time and resources to do work that meets professional standards, they can be forced into less than ideal compromises.

There are several developments and trends that affect the nature and quality of news gathering and interpretation, many of which are not widely known or understood outside news media circles. Some of the country's largest newspapers, which have suffered declining circulation, have been sold or are for sale. The quest for continued double-digit profit margins continues despite the fact that revenues are shrinking along with advertising bases. Most notably, the number of personnel and the size of budgets for news gathering have declined markedly in the past decade. Foreign news gathering has been de-funded to a significant degree. News organizations now rely more heavily on contract and freelance personnel known as "stringers" and "fixers" and contract video footage. These contract personnel, who are sometimes foreign nationals, may not have the same training, experience or professional standards that prevail in the mainstream US media.

Even as personnel have been reduced, the demand for output has grown. The evolution of the media has produced more outlets that have to be supplied with news "content": typically a journalist will file stories to his or her primary publication or broadcast show, but be required as well to supply stories to one or more websites, blogs, newsletters, and commentary or analysis to other media outlets which may be owned by the parent company or merely as part of the growing phenomenon known as "media convergence." Fortunately, senior reporters at national publications can often secure the time and resources necessary for complex and sensitive stories, but the pressures are real and growing. The rise of 24-hour cable news and now the Internet's proliferating platforms have created enormous demand for "content" which must be supplied and updated regularly.

Commentary frequently fills this demand since it costs virtually nothing to produce, compared to reported content. All "expert" opinion is not equal, however, and often the commentators do not fully understand the complex issues on which they speak. Ratings pressures can also feed this tendency toward opinion journalism, which was ushered in by the rise of talk radio stations. While the news media have always included columnists and editorials, which feature opinions, some practitioners feel that opinion and bias can creep into news coverage if reporters and editors are not vigilant in maintaining the traditional distinction between reportage and opinion writing.⁷

Americans' sources of information have diversified in the past decade, but the traditional news media remain a primary source of and conduit for information, analysis and commentary about national security issues, even as nontraditional media such as blogs and webzines continue to grow. The continuing influence of the "mainstream media," particularly large-circulation daily newspapers, national

newsmagazines and network and cable news is such that they play a powerful role in framing the national debate, defining top news stories and shaping public opinion through the approaches they take to these stories. In cases where the news media breaks a story, they single-handedly inject a new topic into the national debate and force others to react to the issue as framed by the media. The tremendous influence that the news media wields makes it incumbent on them to practice their craft according to the highest standards of professionalism. If the media is perceived as inaccurate or biased, it will lose credibility and find its ability to perform a useful societal function greatly diminished.

Notes

1. 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf>.

2. 50 US Code sec. 1801–1811 (2000).

3. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NEW YORK TIMES, Dec. 16, 2005, at A1.

4. *Id.*

5. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASHINGTON POST, Nov. 2, 2005, at A1.

6. Thomas F. Metz et al., *Massing Effects in the Information Domain: A Case Study in Aggressive Information Operations*, MILITARY REVIEW, May–June 2006, at 2.

7. John Carroll, then editor of the *Los Angeles Times*, expressed this concern in an internal memo that he sent to his editors on May 22, 2003, which was widely commented on in media circles. The memo is available at www.laobserved.com/carrollmemo.html (last visited Jan. 22, 2007).

PART V

LUNCHEON ADDRESS

XII

Luncheon Address International Legal Public Diplomacy

John B. Bellinger III*

From the beginning of this Administration, Secretary Rice has made very clear to me that, in addition to providing first-rate legal advice to the State Department's officials, she expects the Office of the Legal Adviser to play a key role in our public diplomacy dialogue. Secretary Rice is aware that the historic commitment of the United States to international law and the rule of law has been questioned after September 11th, and she has personally and repeatedly reaffirmed our respect for and adherence to the rule of law, and our strong commitment to meeting our international legal obligations. "The United States," she has said, "has been and will continue to be the world's strongest voice for the development and defense of international legal norms." She said that we respect our international legal obligations and international law and we will continue to do so. And, apropos for today's discussion, she added this: "We're going to continue to make that very clear to the world."

Secretary Rice has asked me to ensure that I and my staff play a lead role in this effort, as we work to garner support around the world for US positions. I have therefore made it one of my top priorities as Legal Adviser to ensure that we effectively communicate our message to the rest of the world so that the international community understands our commitment to international law and the rule of law,

* Legal Adviser to the Secretary of State of the United States.

as well as the carefully considered legal bases and rationales underpinning policy decisions made by the United States.

Countering Myths

This task is not always an easy one. We hear increasingly that the United States is not strongly committed to international law and international institutions. We hear that the United States acts “lawlessly” on the world stage. The United States refused to ratify the Kyoto Protocol. We “unsigned” the Rome Statute. We withdrew from the ABM Treaty. We went to war in Iraq without a legal basis under international law. And we have violated the Geneva Conventions by holding terrorists in Guantanamo without giving them lawyers or charging them with crimes. This is a troubling pattern of criticism, but US experts in international and national security law, including the lawyers in my office and many of you, are well positioned to explain why none of these acts were “lawless” and why many of these criticisms are simply wrong.

Of course, there are some challenges in public legal communications that do not necessarily exist with respect to our public communications generally. We need, for example, to maintain applicable legal privileges and cannot therefore always discuss exactly how we came to a particular position. Moreover, while legal strategic communications is about persuasion and listening, our commitment to stating the law correctly provides a firm limit to what we can say. Likewise, we are not always able to counter the facts underlying a legal debate because we cannot discuss information that could compromise the success of intelligence, law enforcement and military operations. This dilemma has made the job of explaining our legal position on renditions particularly difficult. Before asserting legal positions, we also need to consider carefully whether and how this might prejudice future policy positions or options. For example, one difficulty with publicizing lawful interrogation techniques to help address concerns of allies is that this public disclosure might facilitate terrorists’ training activities.

Another challenge unique to legal communications is identifying and responding to policy differences that are recast as disputes about law. The United States is, for example, often criticized for not supporting international law because it failed to sign or ratify a treaty. This happened with respect to the Kyoto Protocol, which the United States did not think was sound public policy and would harm the US economy. The decision not to ratify the Protocol was made on that basis and perfectly legal under international law.

With that background, I want to describe some of the specific public diplomacy efforts of the Office of the Legal Adviser, and I hope to encourage the US military

and other government lawyers and officials participating in this colloquium to engage in strategic dialogue about important legal issues as part of your work in the international arena. President Bush has said that public diplomacy is the job of every member of his Administration, and has directed Under Secretary for Public Diplomacy and Public Affairs Karen Hughes to ensure that every agency and department gives public diplomacy the same high level of priority that he does. By talking more clearly—and more often—about our legal positions, as Secretary Rice has said we must do, we can dispel myths, correct misunderstandings, and share and communicate some of America's most basic values.

The Broader Context

The State Department's overall communications strategy involves three strategic imperatives. Our first objective is to offer people throughout the world a positive vision of hope that is rooted in America's belief in freedom, justice, opportunity and respect for all. President Bush and Secretary Rice have emphasized that people around the world should know that we stand for human rights and human freedom everywhere. Second, we seek to isolate and marginalize violent extremists and confront their ideology of tyranny and hate. One of the chief ways we do this is by undermining the efforts of extremists to portray the United States and the West as in conflict with Islam. We work to empower mainstream voices and demonstrate respect for Muslim cultures and contributions. Finally, we seek to foster a sense of common interests and values between Americans and people of different countries, cultures and faiths throughout the world.

Work of the Office of the Legal Adviser

Communications about our legal positions are an important part of the Department's overall strategy. Some of the key communications challenges in our war with al Qaeda and the Taliban, and the conflict in Iraq, illustrate the point. For example, my office has had a central role in explaining the legal basis for our detention operations in Guantanamo and Iraq. We have also responded to the terrible abuses at Abu Ghraib and recent allegations of misconduct by US Marines at Haditha. More generally, I have personally participated in numerous meetings, conferences, symposia and similar gatherings in the United States and abroad regarding important legal topics relating to the conflict with al Qaeda and other issues, and I have led several delegations of US government officials to international conferences in Geneva.

In each of these instances, I and my staff talk about the law to help our counterparts in ministries of foreign affairs around the world, as well as international organizations, non-governmental organizations, opinion makers and the public, understand our legal rationales and, in nations that lack a strong rule of law tradition, to help people understand the importance of law in forming good policy. At the same time, we listen to what colleagues, opinion makers and the general public around the world are saying about the law. By listening to their views and paying attention to their concerns, we show respect for them and we ultimately provide better advice to our clients.

Detention Operations

Let me turn to my first example of how the Office of the Legal Adviser has engaged in public diplomacy to advance the Department's overall communications strategy, namely our central role in explaining the legal basis for our detention operations.

The Office of the Legal Adviser is clearly aware of the concerns people have raised with respect to our detention operations, especially the detention facilities at Guantanamo Bay and our rendition of terrorists in limited circumstances. I have personally engaged directly with my counterparts around the world to explain our legal positions on these matters and to discuss our shared interests in preventing terrorist attacks, gathering intelligence and bringing terrorists to justice. I have traveled to numerous European capitals to meet with legal advisers and other representatives from foreign ministries, the EU and international organizations, and conducted press events and roundtables with those that have a key influence on public opinions and policies. My main goal has been to explain more clearly the legal bases for our detention activities and address the legal concerns that have been raised over the last few years, including by our friends and partners. To do this, I have had to do three main things. First, I have explained with specificity how the US government complies with its Constitution, its laws and its international legal obligations in its detention activities. Second, I have worked to clarify misconceptions about various decisions by our government as well as misunderstandings about various aspects of international law and the Geneva Conventions. Finally, I have emphasized that the US government recognizes that many issues relating to our detention of captured enemy fighters remain a matter of concern in Europe, and elsewhere, and promised to talk more often and more clearly about the issues; at the same time, I have asked that responsible officials and commentators in Europe promote more balanced discussion within their own nations, among themselves and with the United States about the issues.

With respect to compliance with our legal obligations, it has not been enough for me to reiterate that the US government complies with its Constitution, its laws and its treaty commitments in its detention activities. I have spent many hours sitting with lawyers, officials, reporters and commentators explaining the various US criminal laws and international legal obligations that prohibit torture, and describing how US courts have interpreted those laws in specific circumstances. Likewise, I have talked about specific cases of unlawful treatment of detainees and described how the United States vigorously investigated and, where the facts have warranted it, prosecuted and punished those responsible. Unfortunately, it is easy to capture a criticism about a complex legal matter in a pithy sound bite—“prisoners linger in Guantanamo no-man’s land” or “US torture camp at Guantanamo”—but it requires paragraphs of explanation to describe how the United States is, in fact, complying with its legal obligations.

In each of these discussions I emphasize that, even if I cannot persuade my listeners that the position of the US government is clearly correct, at least there is “method” to what some perceive as our “madness,” and that the positions we have taken are legally defensible.

One particular area that has been largely misunderstood by Europeans is the way in which the United States applies the Convention Against Torture’s prohibition against sending a person to a country “where there are substantial grounds that he would be in danger of being subjected to torture.” The European Court of Human Rights has interpreted this prohibition such that it is impermissible for members of the Council of Europe to remove a person to a country where that person might be tortured. Our Senate, on the other hand, has opted for a standard that it is impermissible to remove a person to a country where it is “more likely than not” that that person would be tortured. Both of these standards are valid and each ensures compliance with the relevant Convention Against Torture obligation.

It has been extremely helpful to describe our standard in detail to my European colleagues and to explain that our standard emerged from a democratic process when our Senate ratified the Convention Against Torture in 1990 and was not developed by this or any other Administration. Many Europeans have been receptive to the point that our standard, although different than theirs, was carefully considered, promulgated by our Senate and intended to fulfill our obligations under the Convention. Also, I have emphasized that we share common values—above all a prohibition on torture and on cruel, inhuman or degrading treatment of any detainee—and common objectives in our counterterrorism efforts, including gathering potentially life-saving intelligence from captured terrorists. And, I have pointed out that we have foiled a number of deadly plots against cities and citizens

in Europe and elsewhere as a result of our law enforcement and intelligence cooperation.

Another area of concern with respect to our detention activities has involved our use of the concept of unlawful combatants. Certain academics and others have asserted that the term is not found in the Geneva Conventions but rather was invented by this Administration. I consistently point out that these criticisms are wrong: the concept of unlawful combatants is well recognized in international law by courts, in military manuals and by international legal scholars. By citing specific historical examples of the use of the term unlawful combatants and showing that the United States did not simply make up this term for its own purposes, I have persuaded many European colleagues that the term does, in fact, describe a long-standing category of actors. Some of these colleagues, of course, continue to disagree with our application of the concept, but they know that our legal analysis is rigorous and that we are genuinely concerned with ensuring that our detention activities comport with all of our relevant legal obligations.

Another important misconception that I have tried to correct involves President Bush's signing statement in bringing into law the Detainee Treatment Act, the legislation that includes the well-known McCain Amendment. The President's signing statement included a standard statement indicating that he would interpret the Act consistent with his authorities under our Constitution. Critics argue, and it has almost become urban legend, that the President's statement "proves" that he intends to rely on his constitutional authority to ignore the McCain Amendment. In response, I point out that the President's signing statement reflects a frequently used executive branch position about the execution of laws within the context of the President's constitutional responsibilities, and was not meant to indicate that the President planned to ignore the provisions of the Act.

Our detention activities involve complex legal questions and people around the world have raised concerns about those activities. Often, our job is not so much a matter of explaining the Geneva Conventions or international legal principles, about which foreign audiences tend to be reasonably well informed—albeit sometimes with different views—as it is about communicating our commitment to those principles and explaining clearly US law and the bases for our legal decisions and practices. We talk about how US law comports with our international legal obligations, how US legal positions are well considered by all branches of our government, and we offer alternative explanations for what may seem to be substantive legal differences. When people understand our strong commitment to treating detainees in accordance with our constitutional, statutory and international legal obligations, they understand that we stand for the proper treatment of all people in all contexts.

Abu Ghraib and Haditha

A second example of how the Office of the Legal Adviser has engaged in public diplomacy to advance the Department's overall communications is our work in responding to the terrible abuses at Abu Ghraib and recent allegations of misconduct by US Marines at Haditha.

I have personally engaged in outreach on both of these subjects at home and abroad, in coordination with the Department of Defense and other relevant agencies, and people have appreciated hearing candidly from the State Department's Legal Adviser that the United States takes these incidents very seriously, acts on them promptly, investigates thoroughly and holds the wrongdoers accountable for their actions. We know that one of the great strengths of our nation is its ability to recognize its failures, deal with them and act to make things better. When we explain that we continue to do just that in the war on terror, we reaffirm one of our most basic values for people around the world. In addition, as a practical matter, lawyers play an important role in responding to events like Abu Ghraib and Haditha because we can discuss with authority the specific legal procedures to investigate the incidents and prosecute wrongdoers. Since extremists take full advantage of incidents like Abu Ghraib and Haditha to portray the United States as evil, only rhetorically concerned about human rights and in conflict with Islam, we undercut the terrorists' efforts by addressing abuses and allegations head-on and describing our investigative and prosecutorial procedures.

With respect to crises like the abuses at Abu Ghraib and the allegations of misconduct at Haditha, one of the most important elements of our communications strategy is speed. In an age of mass media and electronic communication, the United States is competing for attention and credibility in a time when rumors can spark riots and protests, as we saw in connection with the inaccurate *Newsweek* report regarding a US soldier flushing a Koran down a toilet, and information, whether it is substantiated by facts or based on mere rumors, spreads instantly around the world and across the Internet. In these circumstances, we need to act quickly to counter misinformation and undermine the efforts of extremists to portray us as evil.

One of the key ways we achieve speed at the State Department is through our rapid response unit, a recent initiative of the Secretary and Karen Hughes. Early each morning our rapid response unit meets to determine what the critical media issues for that day are around the world and what our strategy should be to respond to them. Our lawyers work closely with the rapid response unit to ensure legal issues are properly addressed and that the legal bases for our positions and decisions are accurately and appropriately communicated.

Whether we are responding to a crisis like Abu Ghraib or Haditha or working to explain our legal positions to audiences around the world, talking directly to the press is an important element of our communication strategy. The media plays an important role in shaping perceptions around the world so, just as it is necessary to meet privately with government officials, NGOs and opinion makers, we need to speak publicly to the press to explain our positions. Outreach to Arab media has been especially important after September 11th and I have reached out to them, and the foreign press center generally, as often as possible during my tenure. The foreign press, including Arab media like al-Jazeera, has been very receptive to hearing our legal positions and replaying them in the Arab and Muslim world and elsewhere.

Delegations and Meetings

Before closing, let me briefly touch on the final example where I and my staff engage in public diplomacy as an important part of the Department's overall communications strategy—an example that actually cuts across all of our legal public diplomacy efforts. In addition to the strategic dialogues about critical issues of mutual interest with my European colleagues that I mentioned, I have made it a priority, at the urging of Secretary Rice and Under Secretary Hughes, for me and my staff to talk more often and more clearly about legal matters around the world. We look for opportunities and have increased our budget to attend meetings, conferences, symposia and similar gatherings to listen carefully to our colleagues; show respect for important issues and international law and institutions generally; explain clearly the legal bases for our policies and actions; and advocate forcefully to convince other nations to cooperate with us and live up to their own commitments.

Since becoming Legal Adviser, I have spoken at events hosted by the American Society of International Law, the American Bar Association, the Atlantic Council of the United States, George Washington University Law School, Princeton University and other institutions. Last year, I spoke at the Round Table on Current Problems of International Humanitarian Law in San Remo, Italy, which is the premier conference in the field. I have invited numerous groups and colleagues from around the world to the State Department to discuss critical issues of mutual interest. Whenever possible and appropriate, I have tried to involve the Secretary and other colleagues in our international legal public diplomacy efforts. Many of you might have heard or read the Secretary's remarks at the last two Annual Meetings of the American Society of International Law, the American Bar Association's recent Rule of Law Symposium in Washington, DC, or the Diplomatic Reception of the Washington Foreign Law Society at the State Department last year.

I have led two delegations to international conferences in Geneva to work to enable the Israeli national society, the Magen David Adom, to join the International Movement of the Red Cross and Red Crescent. In May 2006, I led another delegation of senior US government officials to Geneva where we presented our second periodic report to the UN Committee Against Torture, and then responded to the Committee's subsequent report, which contained its main findings and recommendations to the United States.

The Office of the Legal Adviser's leadership of the delegation to the UN Committee Against Torture is an excellent example of how the Department's lawyers contribute to the Department's overall communications strategy by effectively participating in meetings, conferences and delegations around the world. We provided the Committee with an extensive report and thorough answers to the many questions they posed, demonstrating our commitment not only to fulfilling our obligations under the Convention Against Torture, but to engaging in a productive dialogue with the Committee. Moreover, by sending a high-level delegation to Geneva to present our report and engaging in a dialogue with the Committee, we demonstrated our respect for our obligations under international law and our commitment to the Convention's principles.

Conclusion

Our legal public diplomacy efforts have not gone unnoticed. Following our Convention Against Torture presentation, for example, the *Economist* newspaper devoted an entire article to describing "some welcome signs of a change of tone from the Bush administration." They commended our delegation for fielding tough questions on the treatment of detainees with unusual candor and even deference, and cited our discussion with European colleagues on renditions and other detention issues. The *Economist* was unwilling to applaud our policies, but they were willing at least to say that "public relations are improving."

I hear time and again from people around the world that they are grateful for our increased dialogue about critical matters of law—even if we only agree to disagree in some cases, the dialogue is essential. People want to know what we stand for and why. And if we do not tell them, our critics—or worse, extremists—will tell them for us. This is why I and my staff will continue to work to communicate effectively our message to the rest of the world so that the international community understands our commitment to international law and the rule of law, as well as the carefully considered legal bases and rationales underpinning our actions. I encourage each of the US military and other government lawyers and officials—or future lawyers and officials—here to review your own work and consider how you,

too, can play a role in our public diplomacy dialogue. As the President has said, public diplomacy is an important part of each of our jobs. We each need to see ourselves as international diplomats as we conduct our work.

PART VI

CHALLENGES OF STRATEGIC COMMUNICATIONS

XIII

Strategic Communications and the Decline of US Soft Power

Gene E. Bigler*

Abstract

Four strategic communications practices tend to build on one another in contributing to the widely noted and continuing decline in US soft power. First is the problem of inattention to audiences. By neglecting them as we prosecute the war on terrorism, the war of ideas seems to swell more with critics and combatants than allies. Second, recent approaches to strategic communications tend to emphasize process and consistency in uniting messages, but the role of the national executive in achieving convergence may be more crucial. That is, sending identical or even reinforcing messages may not be as important as making sure that the messages are consistent with audience expectations about US policy. Third, Department of State (DoS) financing for public diplomacy has increased only incrementally, if that, while the Department of Defense (DoD) weight in the total flow of strategic communications, as in foreign policy generally, seems to have escalated along with its budget. The continuing deterioration of opinion suggests that the mix of communications is not working, and it certainly contradicts expert advice on the resources needed for public diplomacy.

Finally, the growing concern about the militarization of US foreign policy may reflect the rejection of the “military as messenger” for the United States, even if

* Visiting Professor-Practitioner of International Relations, University of the Pacific, Stockton, California.

civilians actually make the policy. The US affirmation of the preemptive use of force puts the military at the forefront of US strategic policy, just as the conflicts in Afghanistan and Iraq have overwhelmed and tended to color the perception about the rest of our policy. Thus, the increasingly dominant role and resource endowment of DoD in strategic communications might actually worsen the impact on US soft power. While general flaws in US policy and deficiencies in the work of DoS may also contribute to the deterioration of America's international image, recent experience suggests that DoD dominance of strategic communications, and of foreign policy in general, may be increasingly responsible for the deterioration of US international standing.

*Opinions of the United States and American Soft Power
Continue to Decline Together*

Notwithstanding the global outpouring of sympathy for the United States following the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, many observers noted a downturn in public support for the United States during 2002 that reflected widespread deterioration in opinions of the United States. The Pew Research Center for People and the Press reported in December 2002 that images of the United States had become increasingly tarnished in the publics of NATO allies, former East European nations, developing nations and especially Muslim nations and on a variety of dimensions.¹ That report went on to detail how pluralities had become critical of American unilateralism, but this did not extend to rejection, except in Muslim nations, of the approach the United States was taking to the war on terrorism. On the other hand, the report was prescient in recognizing that a potential war with Iraq might "further fuel anti-American sentiment."

As the Pew Center expected, important policy actions, such as the invasion of Iraq, apparently caused a further deterioration in opinions of the United States. Attitudes, even among allied nations, toward the US approach to the war on terrorism also turned sharply negative, and despite some break in the trend during 2005, the overall slide in global opinion of the United States continued to worsen and spread.² Of course, this is a heavily nuanced phenomenon, and lots of other variables and the particular circumstances of each nation are important. This is also characteristic of the factors which are closely related to soft power, a nation's ability to attract and persuade others. Opinions are really a snapshot of people's orientations at a specific moment in time.

Professor Joseph S. Nye, Jr., and a number of others have shown that soft power is also highly situational.³ While acknowledging the influence of other factors that

contribute to anti-Americanism and the decline in soft power, Nye's perspective concurs with the observation of Australian foreign policy commentator Paul Kelly that:

[T]he lesson of Iraq is that the US's soft power is in decline. Bush went to war having failed to win a broader military coalition or UN authorization. This had two consequences: a rise in anti-American sentiment, lifting terrorist recruitment; and a higher cost to the US for the war and reconstruction effort.⁴

Besides the loss of soft power to influence the situation in Iraq, the growing anti-Americanism and deterioration in opinions of the United States will influence our soft power in other contests as well. For instance, recent research on human rights shows that majorities in such allied nations as Great Britain and Germany no longer see the United States as an effective advocate of human rights.⁵ Without entering into details, it is not surprising to hear corridor concerns and read blogger speculation about declining US soft power as a contributor to such differing foreign policy problems as cooperation in managing nuclear confrontations with Iran and North Korea, the improvement of multinational peacekeeping and humanitarian operations in Darfur, or even the advancement of America's trade agenda.

This forum is not the place for a full exegesis of the way in which public diplomacy, strategic communications and propaganda are intertwined in wielding soft power. The broad tendencies of interest here and the degree of consensus about the interconnectivity among them was manifest in the use of a common frame of reference for our conference discussions provided in a timely article by Linda Robinson.⁶ In that article, Robinson describes a visit Secretary of Defense Donald Rumsfeld made to the Army War College in March 2003 in which he lumped all these concepts into a broad "war of ideas" in which he believes America is doing a very poor job: "If I were grading, I would say we probably deserve a D or D plus as a country as to how well we're doing in the battle of ideas that's taking place in the world today. . . ."⁷

Not surprisingly, Secretary Rumsfeld has followed up his expression of concern with some specific actions to study and improve the strategic communications morass in which America has been entrapped for several years. In this regard, his reaction has been concrete and definitely action oriented because of his executive authority, but the realizations that prompted his action are not dissimilar to the concerns that motivated the production of over thirty studies and recommendations within the US government over the last few years to address the problem of public diplomacy. Nor indeed has DoD been alone in trying to deal with the issue. In fact, prior to the recent actions in DoD, much of the effort had

been concentrated at DoS through the appointment of high profile individuals to take charge of the public diplomacy effort. Prominent advertising executive Charlotte Beers was appointed under secretary for public diplomacy and public affairs in December 2002. She was followed by former State Department spokesperson Margaret Tutwiler, and then after a two-and-a-half-year vacancy, the president called on his campaign and White House communications adviser Karen Hughes to take the job and launch yet another reform effort in the fall of 2005.

In 2006, Secretary Rumsfeld proposed some important new initiatives, many of which will only get under way as this volume is being published. Despite the good intentions of all those involved (and in which the author was also personally engaged until July 2005), the hypothesis that informs this analysis is that the new strategic communications effort in DoD may, as we have seen to a certain degree with the increasing efforts and new leadership at DoS, actually be prelude to further worsening of the US image and a greater loss of soft power. It may even be possible that the increasing effort in strategic communications at DoD will actually aggravate and further spread and deepen America's soft power problem. As suggested by the Pew study in 2002,⁸ the fundamental problem is one of policy. This analysis takes that idea a step further by demonstrating that a fundamental part of the policy problem centers on the increasing visibility and ubiquity of the military in America's global communications. Indeed, this may be increasingly at the root of America's loss of soft power as we shall see later.⁹

Audience May Be as Crucial as the Message

As mentioned previously, policy is the crucial issue for the deterioration in opinions of America and American soft power.¹⁰ Yet strategic communications plays an important role, and despite the increasing overall effort put forth by the United States, a good deal of the effort may even be counterproductive. One of the key problems is simply an inattention to audiences or attention to the wrong audiences, especially at the highest levels of government. Implicitly, the US Executive Branch and Congress appear to have decided that they don't care about the opinion of most of the English-speaking world and traditional American allies in Western Europe. Congress has pushed for, and the Executive has complied with, the drastic reductions of public diplomacy spending, cut back or transferred out personnel, and curtailed the broadcasting of the Voice of America to countries that have been traditional friends and allies. Not surprisingly, opinions of the United States have declined markedly in most of these countries. Expanding private-sector communications, increasing tourism and trade, and even the popularity of

American films and TV shows obviously does nothing to stem nor reverse this increasing trend.

The private sector has, however, helped us understand and become more aware of just how bad the opinion trends are because they have learned, especially from the once path-breaking work on global public opinion performed by the United States Information Agency (USIA), that tracking what people think around the world is important. The Office of Intelligence and Research (INR) in DoS inherited this tradition, and it continues to do technically respected, policy relevant research, but not much of it in comparison to yesteryear.¹¹ Today, there is a lot more publicly available data in the private sector on how German or Italian or Spanish or Latin American attitudes toward the United States are changing, so at least we do have a broad sense of what's happening.¹²

The problem for policy is that these private studies provide only a tiny window on the broad trend in audience opinions. The research needed for the formulation of a communications strategy is much more complicated and expensive. INR still does some of this research, but rather than showing the way to the private sector, the work that INR does now on DoS's global audiences is just a fragment of what is done for most international private-sector marketing campaigns or in presidential elections in many countries. Candidates for governor or senator in most states have far more research resources available for shaping their campaigns than do US embassies in important posts over a two- or three-year span. Most of the studies about improving public diplomacy place a lot of emphasis on the need for more public opinion and other types of audience research, but overall funding for research has increased only incrementally over the last few years. The funds that are available have been concentrated much more on the Middle East and a few other priority regions and, even with the increases, the overall effort and systematic attention to audiences in the US government has declined greatly since the Cold War began to wind down.

The audience problem has also become more complicated because of changing technology. Without entering into detail, it has to be recognized that speeches delivered by the president and other high administration officials are often intended more for a domestic audience than overseas publics. However, words intended to arouse patriotism in the United States often have different, if not always opposite, effects overseas, but virtually any speech or op-ed piece or other public position taken by senior American officials is often disseminated more widely outside the United States than in and is readily available for hostile exploitation. For many in the Middle East, the "war of ideas" to which many US officials have made reference has been misunderstood, and partly because it has been wickedly portrayed, as a confrontation with Islam itself. In the context of a war on terrorism in which the

support of foreign publics is vital, the need for more cautious and restrained rhetoric at home is obvious.

Technology complicates the issue further, especially in Iraq and Afghanistan where the United States has suddenly opened the doors, not just to freedom, but to a media diversity that those people have never before experienced. Saddam Hussein used nearly universal access to terrestrial TV broadcasts, while repressing radio, satellite TV, computer/Internet and every other form of media access, to dummy down and shape the information that people had in his "brave new world." The freedom provided by the United States after the invasion included a sudden explosion of exposure to information and the right to opine that the Iraqis love, as shown by the meteoric spread in the use of satellite TV and their high participation rates in polls and election turnout. Whenever even a few hours of electricity could be had, the availability of inexpensive satellite dishes also brought Arab, Iranian and lots of other new media sources. Afghanistan also opened up dramatically in comparison with the past, albeit the geographic, economic and other limitations are much more severe than in Iraq so the opening has not been nearly as pervasive.

Still another dimension, and in the long run in Iraq and Afghanistan perhaps the most serious of the audience problems, is that insurgents intermingle with other groups of people ranging from the actual supporters of enemy combatants to sympathizers with the United States. In these nations and those on the margin of every conflict, DoS and elements of DoD are separately engaged, have different missions and separately conduct political communications operations in the same arena and address overlapping populations. This is much less a problem of DoS than it is for DoD and our military units in the field because the nature of the DoS message is, in fact, public diplomacy. The intention is to be persuasive, arouse sympathy, create goodwill and so on. For military units, much of the time, the purpose of the unit's presence is combat or combat support or force protection. All these missions, by their nature and before there is any communications per se, at least partially convey a message of potential threat and danger. By early 2004, polls in Iraq consistently showed that most Iraqi people did not want the United States to withdraw forces because of their fear of anarchy, but they also didn't want them anywhere nearby because of the danger of those forces being targeted or engaging in combat.

This paper cannot do more than raise a serious concern about the audience issue in combat zones, but experience in Iraq also suggested that we may not have paid as close attention to the importance of not contaminating messages to the noncombatant population with those actually intended for the enemy. Discussions with officers involved in information operations in Iraq first raised this question, especially when hostilities became particularly widespread or prolonged in a given

area. After all, at both the practical level and conceptually, in a combat zone, the overriding mission of the armed forces is the application of force to subdue the enemy, not win hearts and minds.¹³

Evidence for the difficulty of separating out this condition conceptually is fairly common in the military literature and suggests that operationally the difficulty would be much greater. For instance, a thoughtful article by William Darley on the application of Von Clausewitz's traditional war theory to information operations fails to distinguish at all between the mission of compelling an enemy and the problem of that enemy being in the midst of a population that we seek to make our friends. That is, in writing about examples related to Desert Storm where the United States was and departed as an invading force, he fails to mention the all pervasive distinction of our having become an occupying power trying to befriend the Iraqi people as we are during Operation Iraqi Freedom.¹⁴ In another far more complex study that centers on information operations during the 2004 combat that raged in Fallujah, the authors pay more attention, and rightly so, to enemy information operations.¹⁵ Yet, the study lacks as careful attention to the actual engagement of the audience both before and after the attack, thus implying that the deterioration of Iraqi opinion afterwards was largely due to the success of enemy information operations. However, given the predisposition of the Iraqi people toward intensive combat operations of the sort launched in Fallujah, opinion may have declined even without the enemy's apparently successful information operations.

Legal issues in the national security arena raise particularly thorny problems for strategic communications because of their complexity. Here the chief audience consideration centers on the capacity of the audience to comprehend the issue in comparison with the likelihood that a few simplistic images will totally dominate the perceptions and conclusions of the mass public and most other audiences. The debate over whether adherence to the Geneva Conventions should be included in the US military code of conduct or the treatment of detainees is a perfect example. Certainly lawyers and political leaders may perceive ambiguity in the text of the Geneva Conventions, but what most people understand is simply that the Geneva Conventions have symbolized a globally accepted minimal standard of conduct in war for generations.

Getting On the Same Page Counts Less Than Whose Page We Are On

Rear Admiral Thorp initiated this panel with an articulate analysis of the importance of "process" for strategic communications in order to keep all the elements of an organization in harmony with respect to "a good policy." He emphasized the importance of consistency in policy and actions and the extraordinary difficulty of

accomplishing this in the context of national security, public diplomacy and international relations, thereby going beyond the natural emphasis of his remarks on developing a “culture of communications” within DoD. In my view that approach is analogous to the problem of ensuring that all the elements of an organization are on the same page, and I would agree with that approach for a single, even very complex organization, such as DoD. However, I think it falls short of the nature of the interrelatedness required for our national strategic communications and the relationship of DoD to the national undertaking.¹⁶

For the strategic communications of the United States to function properly in advancing our national interests, especially in the soft power arena, the policy and actions of at least our most visible national organizations and disparate actors must be understood “to converge” on a single purpose. In the myriad reports related to America’s public diplomacy problem, this concern has generally been related to the need to integrate the public diplomacy effort with the executive leadership for foreign policy. For instance, in a Defense Science Board report, this is described as “leadership from the top”:

A unifying vision of strategic communication starts with Presidential direction. Only White House leadership, with support from cabinet secretaries and Congress, can bring about the sweeping reforms that are required.

Nothing shapes U.S. policies and global perceptions of U.S. foreign and national security objectives more powerfully than the President’s statements and actions, and those of senior officials.¹⁷

In another excellent analysis and proposal by the Public Diplomacy Council about what needs to be done, the stress is more on the institutional connections to the presidency that are needed. Two of the five major recommendations—numbers one and four—that are advanced focus on this concern:

1. Establish an agency within the Department of State and the National Security Council process, the U.S. Agency for Public Diplomacy (USAPD), to manage the U.S. government’s civilian information and exchanges functions and to coordinate all U.S. government public diplomacy efforts. . . .

4. Establish by Presidential Directive an Interagency Committee on Public Diplomacy at the Cabinet Level to coordinate and direct the national public diplomacy strategy, with a permanent secretariat and associated working groups, co-chaired by the Deputy National Security Advisor for Communication and the Director of the new USAPD Agency.¹⁸

The concern here could also be understood as one of process if that involves making sure that the entire US government strategic communications effort converges on the direction that the president, and through him, the National Security Council and its key components provide for the comprehensive enterprise.¹⁹ However, the American experience since the start of the US effort to respond in earnest to the September 11 terrorist attacks suggests that a still broader definition of convergence is needed. One of the remarkable consequences of those attacks was the sense of global empathy that they evoked. In an obvious allusion to President Kennedy's quip to the beleaguered people of Berlin, Paris' *Le Monde* showed just how strong the feelings were around the world in its September 12 headline, "we are all Americans!" Yet not long after the Bush Administration began to prosecute the war on terrorism and to hunt the perpetrators of the attacks, opinion of the United States began to decline.

Although there may have been widespread sympathy for the United States, it also appears that there were some definite expectations about how the United States would conduct the war on terrorism that were rapidly frustrated, and that this type of frustration definitely escalated and spread antipathy. Accordingly, convergence in strategic communications needs to be concerned with more than simply getting all the messages on the same page as the president's, but for these to have a favorable impact they must also be in harmony with people's expectations about those producing them. Thus it is not just that the messages from the White House and DoS and DoD need to be consistent with those from the presidency, as that these all need to harmonize with people's expectations about the actions and values that America represents. Convergence, then, speaks to the coincidence between message and behavior in order to enable strategic communications to achieve the persuasive capacity or provide the desirable model that creates soft power.²⁰

Many early frustrations about the US conduct of the war on terror came most vividly and boisterously from Muslim nations and Muslim people living in the West as a result of the sudden dramatic increase in security operations in which the negative profile always involved them. The characteristics of the September 11 terrorists suddenly intruded on the lives of tens of thousands of students, businesspeople, international travelers and immigrants, and, despite the overwhelming sympathy of most of these people for prosecuting the war on terrorism, it suddenly called into question the sincerity of the US commitment to respect human and civil rights, as well as religious and ethnic tolerance.

Gradually, a series of other actions by the United States further contradicted values that the United States was expected to honor and advance in the world arena. For instance, the open questioning by senior US officials about the applicability of the protections under the Geneva Conventions long before actual revelations about abuses was not expected. After all, the United States had already been the

overwhelming global military power for the better part of a generation, so if the Geneva Conventions did not apply to the United States, then why should they apply to anyone. The recent harsh rejection by the Bush Administration of the International Criminal Court (ICC) was quickly linked to the questioning of the Geneva Conventions as a sign that the United States was putting itself above the law after having represented itself as one of the leading advocates of international law for over fifty years.

Despite the fact that it was under the Clinton Administration that the United States had opted out of joining both the Kyoto Protocol and the ICC after taking part in their negotiation, the way the Bush Administration opted to harden the US position seemed to represent a sudden increase in US unilateralism, and that increased resentment. Since the United States was viewed as the supreme power of the era, it appeared to be rebuffing its global responsibilities and undermining foreign perceptions of institutions that provided for the common good.²¹ Anyone can Google “truth President Bush” and immediately find harsh, partisan criticisms of the president that may not, however, be recognized as partisan by outside observers.²²

Once the war in Iraq got under way, this pattern of perceptions in foreign audiences was repeatedly reaffirmed by events which seemed to constitute *prima facie* contradictions of the US assertion of lawfulness in the conduct of the war against terrorism. Media stories appeared all over the world about ambiguity in rules of engagement in combat and how individual troops interpreted them or said they were taught to interpret them.²³ The revelation of the abuses of Abu Ghraib prisoners was just the most sensational of a series of cases in which US troops were brought up on charges of misconduct and while that perhaps should have been expected, the majority of the Iraqi people reacted with surprise and disappointment that American troops had proven just as fallible as any others might be. Finally, the long-running saga of Guantanamo scandals, court reversals of government practices, and the Administration’s widely lampooned discussion of alternative procedures and other euphemisms for torture communicated a sense of American disdain for the protections of the Geneva Conventions. Rather than converging to demonstrate the consistency of American behavior with the rhetoric we projected, whatever consistency there may have been in our messages was being completely overwhelmed by contradictions in our performance.²⁴

When Resources Matter

Nearly all the major reports on fixing public diplomacy call for major increases in the allocations available for DoS and for the functions that used to be performed by USIA. The Defense Science Board Report calls for the current resources (both

funding and personnel) of DoS to be tripled,²⁵ but neglects the subject of additional resource needs of DoD to support strategic communications almost entirely. The Public Diplomacy Council recommends a 300-percent increase in personnel and a four-fold increase in program budgets over a five-year period.²⁶

Such reports directly attribute the loss of the US voice and the declining public image around the world to a decline in funding, pointing out how despite the success during the Cold War there was a subsequent pattern of neglect.²⁷ Certainly, the constantly declining overall resource base and the constraint it placed on public diplomacy activities was a major consideration at every stage of my career experience in the field. On the other hand, organization, coordination and technique seem to have been the more important issues for DoD and the work of its professionals in the field of strategic communications. And while my personal experience in direct discussion of strategic communications with DoD and military colleagues was largely limited to four years of service in Italy during the Balkans conflicts and on other theater-wide issues that promoted extensive collaboration and during the last few years in Iraq and Washington, DC, I don't recall that declining resources was ever a major concern of theirs.

Of course, part of the answer for this difference in perspective may be attributable simply to the fact that the DoD budget is dozens of multiples of the size of the foreign affairs budget, before even counting the costs of Iraq and Afghanistan.²⁸ Indeed, the order of magnitude of the difference in resource availability probably has a great deal to do with the reasons that a sophomoric mistake could be made in DoD to enable the Lincoln Group to pay journalists in Iraq for writing friendly stories, thereby undermining the credibility of any favorable information that might appear.²⁹ And during the days of the Coalition Provisional Authority when resources were carefully husbanded for public diplomacy operations per se, a British production company could be paid millions of dollars out of military funds to run vague, feel-good-about-democracy advertisements on Iraqi television.³⁰

The tendency to confuse strategic communications with advertising may be in part responsible for the tendency in the US government to fund DoD strategic communications relatively lavishly in comparison with the starvation diet for public diplomacy.³¹ Every member of Congress understands how expensive media advertising can be and vaguely recognizes that DoS does not engage in that activity because the broadcasting function was handed off to the Broadcasting Board of Governors when USIA was merged into DoS. Moreover, additional ad hoc funding goes to DoD for direct support of military operations. All this means that strategic communications becomes the umbrella for consideration of resource allocations and moves all the further from public diplomacy. Yet it also means that the broader concerns of public diplomacy and its practitioners will be harder to integrate into the

frameworks for orienting and controlling strategic communications. Practically speaking, this also explains why there were no public diplomacy specialists in the direct chain of command over the “feel good” advertising in Iraq.

More basic than the focus on strategic communications is the problem of whether it is the strategic communications or the public diplomacy effort that actually breeds the soft power. With a few exceptions, I think that this point is often lost because of the failure to understand the fundamental difference between the way soft power is developed and used. Strategic communications tends to be considered within the context of the achievement of a relatively specific government objective, while public diplomacy includes such communications but places them in the context of the broader relationship of societal trust, empathy and, hopefully, admiration.³² Since a broader objective and a non-specific time frame are also involved in public diplomacy, this makes it harder for the government to fund it as part of the traditional annual appropriations process.

Thus, the budgetary process disfavors the needed funding of public diplomacy, but in doing so, it may also prejudice strategic communications, or help explain why the Bush Administration drive is still not bearing fruit. That is, I think it reasonable to hypothesize that many, and certainly some of the more important, strategic communications objectives require the existence of a somewhat favorable climate of opinion for the messages to be credible and effective. Accordingly, the neglect for the longer-term public diplomacy effort may doom even a very intense strategic communications campaign.

Undermining the Credibility of the Military as Messenger

The Bush administration’s conduct of the war against terrorism has given rise to an increasing chorus of concern about the militarization of US foreign policy over the last few years. Of course, some of the most articulate voices, such as Chalmers Johnson’s, had begun to raise concerns and link them to historic arguments, especially about American imperialism, and how the conduct of American policy had been associated with antipathy toward America in a given region, especially East Asia and the Philippines, in response to specific actions, such as the expansion of the Vietnam conflict, even before the September 11 attacks.³³ Johnson pursues his basic argument and expands it in the light of developments in the war on terrorism³⁴ and Andrew Bacevich provides a broader focus on military history to develop parallel concerns focused on the Middle East.³⁵ The problem in Johnson’s view is that

[s]lowly but surely the Department of Defense is obscuring and displacing the Department of State as the primary agency for making and administering foreign policy. We now station innumerable more uniformed officers than civilian diplomats, aid workers, or environmental specialists in foreign countries—a point not lost on the lands to which they are assigned. Our garrisons send a daily message that the United States prefers to deal with other nations through the use or threat of force rather than negotiations, commerce, or cultural interaction and through military-to-military, not civilian-to-civilian, relations.³⁶

While the militarization of policy may be responsible for the deterioration of the US image, it is not something for which the military bears direct responsibility or can even fix.³⁷ The problem is akin to that which each military unit now faces when they enter the field in Iraq. Most Iraqis fear having any contact with or even being in the vicinity of the US military, not because they have personally had a bad experience, but because they are aware that Americans are the targets of attacks that are dangerous to anyone near them and that the response to attacks has led to great damage in the surrounding areas, whether intentional or not. Indeed, the crux of the US problem, at least for the war on terrorism, may be in the strategy that the United States elected for pursuing the war on terrorism. That is, in the decision to justify the preemptive use of force for defending American interests.

President Bush's speech at the opening of the United Nations General Assembly on September 12, 2002, provided the first public exposition and justification for the use of preemptive military force by the United States against Saddam Hussein's regime in Iraq. That speech unleashed a wave of global controversy and debate because the US position seemed to hark back to a classical legitimating of war that was supposed to have been superseded by the creation of the United Nations collective security system. Within a few days, the Congressional Research Service, much better known for the quality than the celerity of its work, issued a report stating that "the historical record indicates that the United States has never, to date, engaged in a 'preemptive' military attack against another nation."³⁸

Yet on September 19, 2002, the preemptive use of military force was incorporated as a cornerstone of the US national security strategy and the war on terrorism and thereby set the stage for the subsequent US invasion of Iraq in 2003. Despite the initial military success in Iraq, the reaction of much of the international community continued to worsen and harden despite any justification by the United States about the potential threat of weapons of mass destruction or links to terrorist organizations that had attacked the United States. Not only were the ethics of the US position questioned, but the gradual debunking of every rationale for the

attack except the spread of democracy further weakened the preemptive doctrine.³⁹ According to foreign policy analyst Julia Sweig, the US loss of global respect was due to the imposition of US hegemony on the world community in the way that it had long exercised power in Latin America.

It had been one thing for the global powers that once held a stake in the region to yield grudgingly to U.S. hegemony with the Western Hemisphere in the nineteenth and twentieth centuries. But it was quite another for the United States to subject the entire world community—including former and aspiring world powers—to the fast-and-loose approach to diplomacy, military intervention, sovereignty, and international law that had long been the U.S. currency in America's regional sphere of influence.⁴⁰

Other commentators have emphasized graver problems than the unilateralism and arrogance represented by the US action. Stanley Hoffman comments on how several international analysts link the preemptive strike doctrine to the deterioration of a sense of international order and cites a commentary on the US national security strategy by Henry Kissinger to that effect: "if each nation claims that right to define its preemptive rights, the absence of any rules could spell international chaos."⁴¹ More to the point for this analysis, British commentator David Mepham notes how the negative impact of the loss of US credibility directly undermines public trust in the United States and actually increases the sense of insecurity in the global community that the United States is supposedly making safer.⁴²

Conclusion

The discussion of the first three areas of strategic communications practices discussed in this analysis was made in the spirit of offering experience-based suggestions for improving foreign opinions of the United States and supporting better achievement of policy objectives. For instance, a more explicit focus on the nature of the understanding that an audience brings to an issue should provide the framework for shaping of messages for it, especially given the complexity of legal issues and lawyerly discourse. However, the observation that these practices tend to be building upon one another is intended to suggest how limited the prospects may actually be for improvement in any area to make a difference for the soft power trend overall. That is, simply transferring resources from the strategic communications effort in DoD to the public diplomacy work of DoS probably won't begin to reverse the negative trend. The crucial consideration now probably relates to the way the world has come to consider the exercise of power by the United States. Until we show that we are less inclined to rely on the use of our military or the use of preemptive military force in the face of strategic frustrations, the improvement in

our strategic communications craft will not actually serve to increase US soft power or to improve our long-term ability to advance our interests.

Notes

1. *What the World Thinks in 2002*, PEW GLOBAL ATTITUDES PROJECT (The Pew Research Center for People & the Press, Washington, DC), Dec. 4, 2002, <http://people-press.org/reports/pdf/165.pdf>.

2. *America's Image Slips, But Allies Share US Concerns About Iran, Hamas*, PEW GLOBAL ATTITUDES PROJECT (The Pew Research Center for People & the Press, Washington, DC), June 13, 2006, <http://pewglobal.org/reports/display.php?ReportID=252>.

3. Since developing the concept of soft power in 1990, Professor Nye has returned to it in a number of works. The most comprehensive is JOSEPH S. NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

4. Paul Kelly, *Power Pact*, THE AUSTRALIAN (Sydney), July 26, 2003, at 1, *cited in id.* at 127.

5. *Publics in Europe and India See US as Violating International Law at Guantanamo*, WORLD PUBLIC OPINION.ORG, Jan. 23, 2007, http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/229.php?nid=&id=&pnt=229.

6. Linda Robinson, *The Propaganda War*, U.S. NEWS & WORLD REPORT, May 29, 2006, at 29.

7. *Id.*

8. *What the World Thinks in 2002*, *supra* note 1.

9. This conclusion has been partially influenced by the growing literature on the militarization of America's foreign policy, but it has also been developed empirically. It was originally inspired by observations and experience as the counselor for public opinion and polling for the Coalition Provisional Authority in Baghdad during 2004. That prompted the inquiry and findings reported here. The results of these polls have not been widely disseminated, but a few well known public accounts are available, such as Robin Wright, *Iraqis Back New Leaders, Poll Says*, WASHINGTON POST, June 25, 2004, at A19 and John Solomon, *Poll of Iraqis Reveals Anger Toward U.S.*, ASSOCIATED PRESS, June 15, 2004, *available at* <http://www.commondreams.org/headlines04/0615-08.htm>. Militarization will be discussed further below.

10. Leon Hadar ridicules the idea of using marketing and communications gurus and approaches to address such a fundamental issue as the loss of American credibility, and perhaps the greatest anti-Americanism yet experienced, with the quip: "You can't sell a soap that doesn't wash. It's the policy, stupid." See Leon Hadar, *Innocent Abroad*, AMERICAN CONSERVATIVE, Dec. 19, 2005, *available at* http://www.amconmag.com/2005/2005_12_19/article2.html.

11. The author was on the staff of USIA's Office of Research from 1984–88. My work as the counselor for public opinion and polling for the Coalition Provisional Authority during 2004 was closely coordinated with the current Office of Research in INR.

12. Pew Research Center studies have already been cited (*supra* notes 1 & 2), but there are many excellent sources ranging from organizations that mainly provide access to polling data from others, such as <http://www.angus-reid.com>, to organizations that do their own research, e.g., <http://www.latinobarometro.org>, to those that combine these functions and a lot more, e.g., <http://worldpublicopinion.org>.

13. The report of the Defense Science Board makes this point more generally with respect to the special problem of the terrorism frame of communications that marginalizes other significant issues and obscures the difference between tactical and strategic considerations. See Office of the Secretary of Defense for Acquisition, Technology and Logistics, Report of the Defense Science

Board Task Force on Strategic Communication 17 (2004), available at http://www.acq.osd.mil/dsb/reports/2004-09-Strategic_Communication.pdf.

14. William M. Darley, *Clausewitz's Theory of War and Information Operations*, 40 JOINT FORCE QUARTERLY 74 (2006).

15. The most important reference to noncombatants was to the successful effort made to get them to leave the city. Thomas F. Metz et al., *Massing Effects in the Information Domain: A Case Study in Aggressive Information Operations*, MILITARY REVIEW, May–June 2006, at 26, available at http://www.army.mil/professionalwriting/volumes/volume4/july_2006/7_06_2.html.

16. The emphasis here is on DoD, but DoS does not differ in emphasizing unity of message. For instance, Luanne Traud highlights the emphasis Karen Hughes placed on the creation of a new rapid response unit to get the US government on the same page. See Luanne Traud, *Stay the Course; Speak on Message*, ROANOKE TIMES, May 17, 2006, at B9, available at http://uscpublicdiplomacy.com/index.php/newsroom/johnbrown_detail/060519_pdp/.

17. Report of the Defense Science Board Task Force on Strategic Communication, *supra* note 13, at 3.

18. PUBLIC DIPLOMACY COUNCIL, A CALL FOR ACTION ON PUBLIC DIPLOMACY 3–4 (2005), available at <http://pdi.gwu.edu/merlin-cgi/p/downloadFile/d/7536/n/off/other/1/name/ACALLFORACTIONONPUBLICDIPLOMACY01-2005prin/>.

19. A significant step in this direction was taken in 2005 with the establishment of the Policy Coordination Committee on Public Diplomacy and Strategic Communications and the position of deputy national security advisor for strategic communications and global outreach as part of the reorganization of the National Security Council. Karen Hughes emphasizes the importance of the creation by DoS of a rapid response unit as a measure that “literally gets the U.S. government on the same page.” See Traud, *supra* note 16. Yet the argument here is that even getting the entire US government on message is still not the crucial consideration.

20. Intellectual discourse about public diplomacy has grown rapidly in recent years and is benefiting from significant contributions from outside the United States. Jan Melissen has been one of the more significant international contributors. Although his focus tends to be more on actions centered in the foreign ministry, the concept of “societization” of public diplomacy that he has advanced is similar to the idea of convergence mentioned here. While Melissen also stresses the increasing significance of two-way communications in the field, he does not include the two-way perspective within the concept of “societization.” See Jan Melissen, *Reflections on Public Diplomacy Today*, Remarks Before the Conference on Public Diplomacy (Feb. 6, 2006), available at <http://ics.leeds.ac.uk/papers/vp01.cfm?outfit=pmt&folder=7&paper=2655>.

21. UNILATERALISM AND U.S. FOREIGN POLICY 15 (David M. Malone & Yuen Foong eds., 2003).

22. This is consistent with the underlying problem of fragmentation of political culture, the subject of the brilliant analysis in Donna Oglesby’s paper, *A Pox on Both Our Houses*, delivered at the American Political Science Association Conference on International Communication and Conflict on August 31, 2005. Oglesby suggests that the problem is still more profound because of the fragmentation of political culture.

23. See, e.g., Rod Nordland & Babak Dehghanisheh, *Rules of Engagement*, NEWSWEEK, Nov. 29, 2004, at 24, available at <http://www.msnbc.msn.com/id/6542346/site/newsweek/>.

24. This discussion has concentrated on legal issues and is concerned with the global context of strategic communications. Within Iraq itself, the discord, rather than convergence, between communications and perceptions was much less concerned with legal matters. Polls in 2003–04 repeatedly demonstrated that the failure of the United States to deliver the promised benefits of

improved peace and security and quality of life, including availability of electricity, jobs and so on, was strongly related to the steady increase in negative attitudes toward the United States.

25. Report of the Defense Science Board Task Force on Strategic Communication, *supra* note 13, at 8.

26. A CALL FOR ACTION, *supra* note 18, at 3.

27. Stephen Johnson & Helle Dale, *How to Reinvigorate U.S. Public Diplomacy* 2–6, HERITAGE FOUNDATION BACKGROUNDER, No. 1645, Apr. 23, 2003, available at <http://www.heritage.org/Research/NationalSecurity/bg1645.cfm>.

28. DoS may have been the original source of its own funding disadvantage in the foreign policy arena when it joined with the still fledgling DoD to endorse the call for a dramatic buildup of military forces in the famous National Security Council Report No. 68, United States Objectives and Programs for National Security, Apr. 14, 1950, available at <http://www.fas.org/irp/offdocs/nsc-hst/nsc-68.htm>. Describing the resource imbalance that had been developed thirty years later, Zbigniew Brzezinski said: “In the Department of State you have the glory of the office, to fly around in a big plane and to appear at international meetings. But you don’t have the clout. The Secretary of Defense spends money while the Secretary of State begs for money.” Quoted in DAVID ROTHKOPF, *RUNNING THE WORLD: THE INSIDE STORY OF THE NATIONAL SECURITY COUNCIL AND THE ARCHITECTS OF AMERICAN POWER* 181 (2005). Of course, as the merger of USIA into DoS was undertaken during the 1990s, the overall post-Cold War decline in funding for public diplomacy first accelerated and then kept deteriorating until at least 2004, despite the statutory safeguards for Fulbright exchanges and a few favored programs, the appointment of politically prominent under secretaries, and the many studies that called for more funding.

29. A DoD inquiry led by Rear Admiral Scott Van Buskirk concluded that propaganda efforts, including the paying of reporters, could damage US credibility and should be stopped. David S. Cloud, *U.S. Urged to Stop Paying Iraqi Reporters*, NEW YORK TIMES, May 23, 2006, at A19, available at <http://www.nytimes.com/2006/05/24/world/middleeast/24propaganda.html?ex=1306123200&en=87f776e901aa126a&ei=5088&partner=r>. Of course, military public affairs manuals have always taught this, and the many competent, hard-working military public affairs officers at the field grade level and above that I have known have been well aware of this precept. Accordingly, I am left with the impression that there was inadequate military supervision of the activity or such an abundance of resources that the decision may have been made at a lower level.

30. One commercial upon which much hope was based showed Iraqi youth of apparently different backgrounds joyfully playing soccer together as an apparent metaphor for the task of national unification. Unfortunately, the use of the spot had to be curtailed abruptly when news got out that it had been produced in a neighboring country with local children, presumably because security conditions in Iraq prevented filming it there with Iraqi children.

31. In a survey of embassy public affairs officers in 2003, half reported to the US Government Accountability Office (GAO) that they lacked sufficient officers to carry out public diplomacy activities. See Jess T. Ford, *State Department Efforts Lack Certain Communications Elements and Face Persistent Challenges* (May 3, 2006), available at <http://www.gao.gov/new.items/d06707t.pdf>. Mr. Ford, the Director, International Affairs and Trade, GAO, was testifying before the Subcommittee on Science, the Departments of State, Justice, and Commerce, and Related Agencies, House Committee on Appropriations.

32. For instance, Professor Nye argues that one of the most successful of all soft power episodes was the Cold War exchange program that brought Alexander Yakovlev to the United States in 1958 and exposed him to the pluralist ideas that later influenced the development of *glasnost* and *perestroika*. This, and most of the other classic episodes of public diplomacy described nicely

on <http://www.softpowerbeacon.blogspot.com> by Mark Safranski, emphasize the long-term framework in which successful public diplomacy takes place.

33. Chalmers Johnson's book, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* (2000), focuses specifically on the unexpected consequences of America's overseas military presence and actions. Stuart C. Miller's work, *BENEVOLENT ASSIMILATION: THE CONQUEST OF THE PHILIPPINES, 1899–1903* (1982), is more limited in scope. Both analyses are rooted in a concern for overseas expansion through military action that harks back to Charles Beard, William Appelman Williams, Richard Van Allstyne and others.

34. CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY AND THE END OF THE REPUBLIC* (2004).

35. ANDREW BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005).

36. JOHNSON, *supra* note 34, at 5.

37. Further evidence for Bush Administration preference in the use of the military over civilian resources in the conduct of foreign policy came out just as this paper was being completed. See Mark Mazzetti, *Military Role in U.S. Embassies Creates Strains, Report Says*, NEW YORK TIMES, Dec. 20, 2006, at A8, available at <http://www.nytimes.com/2006/12/20/washington/20embassy.html?ex=1324270800&en=e8eb89f0fec1df44&ei=5088&partner=rssnyt&emc=rss>. Mazzetti reported that the Senate Foreign Relations Committee staff had just completed a report showing that "the expansion of the Pentagon's presence in American embassies is creating frictions and overlapping missions that could undermine efforts to combat Islamic radicalism." *Id.*

38. See Richard F. Grimmett, *U.S. Use of Preemptive Military Force*, Congressional Research Service (Sep. 18, 2002), available at <http://fpc.state.gov/documents/organization/13841.pdf>.

39. The Carnegie Council organized a high-level debate on the question of evaluating the preemptive use of force that was the subject of an entire issue of volume 17, no. 1 of their journal *ETHICS AND INTERNATIONAL AFFAIRS* (Spring 2003). On the deepening of the controversy, see Howard LaFranchi, *Bush's 'Preventive War' Doctrine Under Seige*, CHRISTIAN SCIENCE MONITOR, Feb. 4, 2004, at 1, available at <http://www.commondreams.org/headlines04/0204-03.htm>.

40. JULIA E. SWEIG, *FRIENDLY FIRE: LOSING FRIENDS AND MAKING ENEMIES IN THE ANTI-AMERICAN CENTURY* 53 (2006).

41. Stanley Hoffman, *The Foreign Policy the U.S. Needs*, THE NEW YORK REVIEW OF BOOKS (Aug. 10, 2006), available at <http://www.nybooks.com/articles/19217>. Hoffman quotes Henry Kissinger's statement in *American strategy and pre-emptive war*, TRIBUNE MEDIA SERVICES, Apr. 13, 2006, available at <http://www.ihl.com/articles/2006/04/13/opinion/edkiss.php>.

42. LaFranchi, *supra* note 39, quotes the associate director of the London-based Institute for Public Policy Research as saying: "The lack of credibility brought on by going to war in Iraq on the basis of inaccurate intelligence has undermined public trust and made the world more insecure."

XIV

Strategic Communications and the Battle of Ideas

Mari K. Eder*

[I] have been commenting on the challenges our country—not just our government—but our country faces in fighting a war in this new media age. And while the enemy is increasingly skillful at manipulating the media and using the tools of communications to their advantage, it should be noted that we have an advantage as well: and that is, quite simply, that truth is on our side and ultimately . . . truth wins out.

I believe with every bone in my body that free people, exposed to sufficient information, will, over time, find their way to right decisions.

Donald Rumsfeld¹

This quote and other like comments in recent months have served to reignite the public debate about strategic communications, propaganda and how our government communicates, at home and to the world.

A great deal of that frustration centers on the existing capability of current public affairs communications structures to deliver the nebulous benefits of “strategic communications.” This situation is not unique to the Department of State, the Department of Defense (DoD), the Army and the other military Services or elsewhere in the executive branch of government. Yet as our government works on transforming to meet the requirements of a new age, the question of how to transform and strategically develop communications is one of great concern.

* Brigadier General, US Army.

At issue is the concern that America does not communicate clearly with the world. Oftentimes there is concern that the US government sends “mixed messages” or fails to clearly and consistently communicate policy. While this has the potential to frustrate allies and confuse both potential friends and enemies, it also conveys weakness in the national will to any nation seeking to understand the intent of the United States with regard to international relations. The recent Supreme Court ruling on tribunals is a case in point.² Did the Court’s ruling that military tribunals are illegal convey a strategic or mixed political message to international audiences?

A review of international news in the days following the ruling reveals reactions ranging from appreciation of the American democratic process to cautious optimism or even outright skepticism. *BBC News* from London bluntly termed the ruling a “Stunning rebuff to President Bush,” and the French press generally followed a similar theme of “Supreme Court Disavows Bush.” German national radio hailed the ruling as a “Victory for the Rule of Law.” Civilian news media from Spain and Italy to Pakistan and China agreed, while in Sweden editorial writer Henrik Bredberg, in the liberal South Sweden newspaper *Sydsvenskan*, commented “Now the judicial power has put a check on the executive power. Thanks for that.”³

The Arab press reaction was more skeptical. In London’s *Al-Hayat* Arabic newspaper, columnist Jihad al-Khazin commented,

This was all great news, so great that it was reported by all American and international media outlets and continues to draw reactions until this very day, but none of it is true, or, if we wish to be accurate, will never see the light of day, because on the same day that the Bush Administration declared its commitment to the Supreme Court’s ruling, the Senate Judiciary Committee was holding hearings on the treatment of accused terrorists.⁴

In March 2006, Under Secretary of State for Public Diplomacy and Public Affairs Karen Hughes gave a speech on transformational public diplomacy at the Baker Institute for Public Policy. In her remarks she talked about six key areas in which transformation is fundamentally changing the way the State Department does business. She first discussed how funding is increasing for programs that are working. In particular, she mentioned international exchange programs, a direct form of community outreach, albeit on a global scale. She noted, “People who come here see America, make up their own minds about us and almost always go home with a different and much more positive view of our country.”⁵

Hughes went on to discuss the State Department’s emerging strategy concerning public communications. While acknowledging the rapidity of global communications, she touted the Department’s new Rapid Response Center—not a

completely new concept, but a hybrid based on the successful model used by Department of Defense public affairs during the kinetic phases of the recent wars in Afghanistan and Iraq. The Center monitors daily communications worldwide and provides a summary to diplomatic outposts, along with America's message in response. This information enables American government representatives to be more effective advocates for US policy. Additionally, the establishment of regional hubs to position spokesmen in key media centers like Dubai will ensure even greater presence and reach. Hughes has likewise given ambassadors and foreign service officers greater freedom to reach out, both directly and through the civilian news media.

Finally, Hughes said the State Department is placing greater emphasis on using public diplomacy to shape policy. From her travels, she learned that America hasn't always shaped programs to make their benefits clear to average people. She said, "[The President has] now instructed us to look at ways to make our programs more effective, to set clearer goals, focus our programs and partner with the private sector . . . then make sure we communicate what we are doing—a perfect example of the intersection of public diplomacy and policy."⁶

Defense Communications Strategy

In his recent speech to the Council on Foreign Relations, Secretary of Defense Donald Rumsfeld commented on the Defense Department's view of the way ahead:

[G]overnment public affairs and public diplomacy efforts must reorient staffing, schedules and culture to engage the full range of media that are having such an impact today.

Our U.S. Central Command, for example, has launched an online communications effort that includes electronic news updates and a links campaign, that has resulted in several hundred blogs receiving and publishing Centcom content.

The U.S. government will have to develop the institutional capability to anticipate and act within the same news cycle. That will require instituting 24-hour press operation centers, elevating Internet operations and other channels of communications to the equal status of traditional 20th century press relations. It will result in much less reliance on the traditional print press, just as the publics of the U.S. and the world are relying less on newspapers as their principal source of information.

And it will require attracting more experts in these areas from the private sector to government service. . . .

We need to consider the possibility of new organizations and programs that can serve a similarly valuable role in the war on terror in this new century. . . . There's no guidebook . . . no roadmap . . . to tell our hard working folks what to do to meet these new challenges.⁷

DoD efforts to focus on the need to improve public affairs were brought to the forefront in 2004 during a "Tank brief" to the Service chiefs of staff on the subject of public affairs. That session was held as the result of a continuing debate centering on the frustration of commanders with a communications process that had not only been ill defined, but little understood. It is reminiscent of the comment by Admiral Ernest J. King, Chief of Naval Operations, who reportedly said the following in the early days of WWII, "I don't know what the hell this 'logistics' is that Marshall [Army Chief of Staff General George C. Marshall] is always talking about, but I want some of it!"⁸ Many felt the same about strategic communications although few knew what it was or how it should work. To this day, strategic communications remains potentially the most misused and misunderstood term in the military lexicon.

Following that session, DoD began to move to grow a strategic communications capability and structure, supported by the findings of the Quadrennial Defense Review (QDR). Recognizing the importance of applying strategy to communication, the position of Deputy Assistant Secretary of Defense (Joint Communication) (DASD(JC)) was created in December 2005. This billet was established to "Shape DoD-wide processes, policy, doctrine, organization and training of the primary communication supporting capabilities of the Department. These include public affairs, defense support for public diplomacy, visual information, and information operations including psychological operations."⁹ The terms of reference established for the creation of this position state that it exists to maximize DoD's capability to communicate in an aggressive and synchronized manner. It clearly represents the first formal recognition of the need for a military communication advocate at the highest level.

One of the primary tasks of the DASD(JC) is to drive communications transformation in DoD and to implement decisions from the 2006 QDR to improve all aspects of strategic communications. A working roadmap is being developed to provide strategic direction, objectives, milestones and metrics for success. Just as importantly, the roadmap identifies program and budget implications of strategic communications initiatives.¹⁰ There are three overarching objectives the roadmap seeks to achieve:

1. To define roles and develop Strategic Communications doctrine for the primary communication supporting capabilities: public affairs, information operations, military diplomacy and defense support to public diplomacy.

2. Resource, organize, train and equip the DoD's primary communication support capabilities.
3. Institutionalize a DoD process in which Strategic Communication is incorporated in the development of strategic policy, planning and execution.

There has never been a validated joint requirement for public affairs. No requirement had been established for a public affairs capability to support joint/combined/expeditionary operations. The consequences of this omission set the groundwork for failure in communicating operations that developed rapidly and on the global media stage. What commanders expect/want is not described in any detailed fashion so the Services were left to estimate requirements through their own doctrine; thus there should be no surprise that capabilities did not match demands or expectations.

Along with the establishment of the position of the DASD(JC), DoD took steps to formally assign responsibility for communication proponentcy, to establish a joint structure to provide a rapidly deployable communications capability and to build a capacity to develop both communications doctrine and materiel. These capabilities were embedded in the mission set and function of the Joint Forces Command-based Joint Public Affairs Support Element (JPASE).

The evolving JPASE organization exists to support the integration of communications into warfighter training, to develop operational public communications programs and policies to support the warfighter and to provide the combatant commander with a rapidly deployable military public affairs capability at the beginning of an operation, when public communications are most critical and have the potential to be most effective.

In the past several years, much discussion in the Army has centered on the inability of the existing public affairs structure to serve the Army with a strategic communications capability. In fact, the function had not been empowered and has been barely resourced to succeed. Despite repeated recommendations from studies such as the McCormick Foundation's report *America's Team; The Odd Couple—A Report on the Relationship Between the Media and the Military*¹¹ following the Gulf War, the Army did not prioritize the public affairs resources necessary for it to serve as the information combat force multiplier it can—and should be. Journalist Richard Halloran explained it this way more than fifteen years ago:

The most important element in the relationship between a journalist and a PAO [public affairs officer] is the policy of the PAO's commander. A commander with an open attitude communicates that tone to his subordinates and enables the PAO to do his job. A commander who wants a palace guard will get it, and with it, most likely, a

bundle of bad press clippings. . . . Equally important, when things beyond the PAO's reach go wrong, and they will, the commander must protect him against the wrath from above, just as he would protect another staff officer.¹²

The Army public affairs field not only failed to improve in the years following the first Gulf War, its stature even declined. How did this happen to a career field that seemed to be advancing well, as recently as a few years ago? It happened surprisingly in plain view—of Army leaders, public affairs practitioners and the audiences the Army serves. It happened despite a plethora of studies on the “military-media relationship,” although nearly all of these deal with the relationship between military leaders and the media. Very few ever address the actual communications business of public affairs or the public affairs professionals who facilitate relationships on both sides of issues.

The balance may have changed as the role of Information Operations began to rise and gain influence and recognition, at the expense of the less-well-funded and operationally regarded public affairs organization. This occurred concurrently with the advent of the term strategic communications and its subsequent growth in appeal and stature. It seems that one reason for the appeal of both information operations and strategic communications lies in the inherent nature of the one-way communications that use of the term invokes. Many senior Army operators, as they have historically, don't trust the press and by association, similarly distrust their press officers. And while some believe Information Operations, by its very nature, doesn't necessarily require or involve interaction with public affairs or the media, it is absolutely essential that public affairs professionals have complete access to, and situational awareness of, any communication interaction in the global information environment. It can be, after all, the most seemingly insignificant communication that can have international or strategic consequences.

Even as the QDR addressed the need to implement a culture of strategic communications within the Department of Defense via the Strategic Communications Execution Roadmap, the Services were beginning to move forward to make sense of a concept that has been broadly but poorly defined, and often little understood. In the Army, the concept of developing a strategic communications process was initiated in 2004 with the establishment of a Strategic Communications team within the Office of the Director of the Army Staff.

While the team's charter required linking communications to Army strategy and priority programs, it has taken nearly two years for the effort to mature to a level that can best be described as “walk” in the “crawl, walk, run” paradigm. Since then, the responsibility for all Army strategic communications planning was transferred to the Office of the Chief of Public Affairs, along with the attendant staffing

and funding for contract support. Using an enterprise approach to communications across the Army, the new staff is tasked to understand and define their charter; develop relationships with Headquarters strategists, subject matter experts and other communicators; and create the structure, processes, culture and image to communicate the Army's story. Through the Strategic Communications Coordination Group they moved to develop plans and associated products, such as the Army Communications Guide, furthering understanding of significant Army themes and messages, campaigns and events by a variety of audiences.

Today, there is growing senior staff-level support for the application of strategy to communications and acceptance of collaborative planning processes in crafting major communications campaigns. This initial framework for public affairs is serving as a sense-making device, a construct that allows us to make sense of a new idea.

The progress to date cannot be described as grand strategy on the national level, or even DoD-level application of strategic communications. The impact of strategic communications planning and processes at the Department of the Army is that strategic communications has become well-nested in the Army's strategy for transformation and solidly linked to the National Military Strategy (Addendum, Figure 1). This is significant. By beginning the hard, detailed, day-to-day work of establishing coordination and development/design processes for communications planning first at the Headquarters, and in the next year, throughout the Army's subordinate commands, the Army has taken the initial difficult steps of building an understanding of what strategic communications is and how strategic communications planning can work.

These efforts have already paid dividends in linking communications to the Army's long-term programs and processes in supporting transformation (Addendum, Figure 2). As national concepts of strategic communications planning mature and the Department of Defense implementation of strategic communications processes evolve, the Army's efforts to date will ensure the Army is ready to support and complement those efforts.

Former Special Assistant to the Secretary of Defense Larry DiRita said the headache of transformation is worth it: "The old-fashioned idea that you develop the policy and then pitch it over the transom to the communicator is over. You're continually thinking about communication throughout the course of the policy development process."¹³ This is the baseline for, and well-codified in, the recent QDR.

The Public Affairs Officer

At the unified commands, public affairs capabilities had been historically diminished through restrictions in force and grade structure. A colonel/captain-level

public affairs officer (PAO) serving on the Unified Commander's staff absolutely cannot compete on a level playing field with the two-star J-3s and J-4s for the Commander's time and attention. The senior communicator on a four-star combatant commander's staff must be, at a minimum, a one-star flag officer. Otherwise, the message is that the communications function is significantly less important than the other command and staff functions.

An effort to remedy this situation through a proposal for brevet promotions did not advance this past year at DoD, but shows promise for the future. Recommendations supporting this change first surfaced *over fifteen years* ago and, while the recommendations have great merit, they have languished in a zero-growth environment as being "just too hard" to accomplish.

In 1995 the Freedom Forum First Amendment Center's report, *America's Team; The Odd Couple*, focused on the relationship between the media and the military. The study was extensive and the recommendations detailed and exacting. The report recognized the need for strategic public affairs leadership at the unified commands, stating, "In major conflicts such as Desert Storm, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff should consider assigning an officer of flag or general rank in the combat theater to coordinate the news media aspects of the operation under the commander of U.S. military forces."¹⁴

This did occur at US Central Command in the early days of Operation Iraqi Freedom. As operations in the Central Command theater began to generate operational velocity on the international stage, it became apparent the public affairs colonel did not have the staff muscle to serve the command at that required level. Rear Admiral Craig Quigley, a career public affairs officer, was detailed from the Office of the Secretary of Defense Public Affairs to Central Command to serve as the Director of Public Affairs. Upon his retirement, Jim Wilkinson, a White House appointee with general officer-commensurate rank, was assigned to take his place. When Wilkinson left at the conclusion of major ground combat operations, US Central Command looked for a civilian of his stature, experience and connections to take his place. That search was unsuccessful and the Central Command public affairs effort slowly began to revert back to its pre-war configuration and capability.

By the summer of 2004, US Central Command's public affairs staff complexion had changed drastically from what it was at the height of the conflict. From a staff of 70, headed by a general officer or civilian equivalent, to a staff of barely ten, the office remained functional despite the split operations between Tampa, Florida and Doha in Qatar. Obviously, such a limited staff was unable to deal with the tempo of communications requirements, either with American or international audiences, that had increased since the end of the conflict. This was not due to a

lack of proficiency on the part of the staff, but was a direct result of the immense nature of the continuing demands of the global information environment.

Information Operations began to expand to fill that void, although later the overlap in mission sets was largely resolved with an expanded staff in the public affairs office. That office generated a strategic communications approach to reaching American, allied and Iraqi audiences and initiated an aggressive communications outreach focus.

The Army's position is that all general officers are both senior leaders and senior communicators. The Army focuses on the need to broaden the baseline communications skills of all Army officers and make them all communicators. Those who choose the Public Affairs Functional Area career path must understand this reality. Following DoD's lead, Army public affairs proponentcy is likewise reviewing the career paths, training and education for all its public affairs officers. For example, advanced degree opportunities are much broader, including such disciplines as mass communications, strategic communications, diplomacy, international relations or even public administration. The Army recognizes its communications professionals need to be more broadly capable, culturally aware and able to operate in volatile, uncertain and stressful information environments.

The PAO is grounded in the operational Army through a base career as a soldier and a leader, commander and staff officer. Once entering the communications career field, this pentathlete can provide a broad range of communications capabilities to a commander. The PAO typically manages a portfolio that spans the full spectrum of information delivery, from internal product development, to staff participation in the military decision-making process, to outreach innovation, legislative liaison, crisis communications, speech/testimony writing and communications operations, as well as strategic communications planning.

Army public affairs officers are already leaders, spokesmen and Army champions, translators and advocates. They are strategic communications planners and independent thinkers and decision makers. Future plans are to broaden their experience base to ensure that PAOs are agile, flexible, culturally aware, sophisticated in emerging communications technologies and savvy in dealing with all types of media. Additionally, the notion of "broadening" career experiences for all Army officers is expanding through the Joint, Interagency, Intergovernmental, Multinational (JIIM) opportunities program. There are a number of other natural opportunities for an officer with this broad skill set to pursue: recruiting/marketing, legislative liaison, strategist, scholar or interagency fellow.

Of late, both the Army and the Air Force have placed individuals with operational backgrounds in the position of chief of Service communications. Kenneth Bacon, a former reporter who became Pentagon spokesman during the Clinton

administration, has commented on this recent trend. “By far, the Navy and the Marines have been the most successful at public affairs,”¹⁵ he said. In the Navy in particular, he added, “They get these guys as young lieutenants, they work their way up through the system, and they know one of them is going to end up as Chief of Naval Information [the top Navy spokesman].”¹⁶ This is not true in the Army or the Air Force.

In his recent testimony before the House Armed Services Subcommittee on Terrorism, Unconventional Threats and Capabilities, Rear Admiral Frank Thorp agreed. “The Navy . . . is the only military service to consistently promote Public Affairs professionals to flag rank,” he stated. And now, “Only one of the four services communication efforts are led by a career-qualified communication professional.”¹⁷

So while the officers now heading Air Force public affairs have made “a good start,” Bacon said, “if you really want to improve public affairs, you need to make it a productive career path: Build a strong cadre of young officers and promote them up the chain until one of them becomes the top person in public affairs.”¹⁸ The advent of broad-based strategic communications processes and the pentathlete concept for officer career development certainly makes this outcome possible for the Army’s public affairs career professionals.

Vision

The emergence of strategic communications as a concept around which we can build solid, meaningful and timely national communication of policy is logical and ripe for development. At the national level our greatest asset is the recognition that from the seat of government, communications must be tied to national strategy and policy. Strategic communications is evolving as a process, one of necessity born in collaboration and integrated into every operation emanating from the national security strategy of the United States. Within the executive branch of government, we must be able to communicate consistently and clearly with America’s allies and foes, with international audiences across the world stage and remove the haze of suspicion born of mixed, changing or incomplete messages.

In DoD, our most promising efforts center on the evolving QDR Roadmap and ongoing efforts to organize, equip, and train career public affairs officers and support change in the communications field, while educating the force as to the broad range of capabilities this joint field can offer the joint commander. Strategic communications is not public affairs, but what it brings to public affairs is the strategic tie, focus and structure.

In the Army, the advent of strategic communications offers the resurrection of a small, historically marginalized career field, providing both challenge and

opportunity for sophisticated career communications professionals. The door is open for these pentathletes to fulfill the need for strategic communications planning, to teach awareness and broaden the communications capabilities across the Army, and to provide strong communications support to the warfighter. This is the potential for strategic communications—to offer insight and understanding of how to apply information as a formidable element of national power.

Strategic communications is the process that serves as our route to the future, an acknowledgement of the need to craft communications with forethought, insight, and necessary ties to national strategy and US government policy objectives. It is logically led by career public affairs officers who have the training, experience, capability and potential to make it successful.

Notes

1. Donald Rumsfeld, Remarks at the Council on Foreign Relations (Feb. 17, 2006), *available at* <http://www.defenselink.mil/Speeches/Speech.aspx?SpeechID=27> (emphasis added).
2. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
3. Henrik Bredberg, SYDSVENSKAN, June 30, 2006.
4. Al-Khazin, *Commander in Chief Who Never Commanded*, AL-HAYAT (London), July 17, 2006, at 20.
5. Karen P. Hughes, Remarks at the Shell Distinguished Lecture Series, Baker Institute for Public Policy (Mar. 29, 2006), *available at* <http://www.state.gov/r/us/64106.htm>.
6. *Id.*
7. Rumsfeld, *supra* note 1.
8. Robert D. Heintz, Jr., DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 175 (1966).
9. Lawrence DiRita, Terms of Reference, Deputy Assistant Secretary of Defense (Joint Communication) in the Office of the Assistant Secretary of Defense (Public Affairs), (Jan. 6, 2005) (on file with author).
10. Draft Quadrennial Defense Review Execution Roadmap for Strategic Communication (Feb. 2006) (on file with author).
11. AMERICA'S TEAM; THE ODD COUPLE—A REPORT ON THE RELATIONSHIP BETWEEN THE MEDIA AND THE MILITARY (Frank Aukofer & William P. Lawrence eds., 1995) [hereinafter AMERICA'S TEAM; THE ODD COUPLE].
12. Richard Halloran, *Soldiers and Scribblers Revisited: Working With the Media*, PARAMETERS, Spring 1991, at 10.
13. Linda Robinson, *The Propaganda War*, U.S. NEWS & WORLD REPORT, May 29, 2006, at 29–31.
14. AMERICA'S TEAM; THE ODD COUPLE, *supra* note 11, at 3.
15. Sydney Freedberg, Jr., NATIONAL JOURNAL Daily Briefing, Feb. 17, 2006.
16. *Id.*
17. Statement of Frank Thorp, Deputy Assistant Secretary of Defense (Joint Communication) at a closed door hearing of the House Armed Services Subcommittee on Terrorism, Unconventional Threats and Capabilities, 109th Congress (July 19, 2006).
18. Freedberg, *supra* note 15.

ADDENDUM

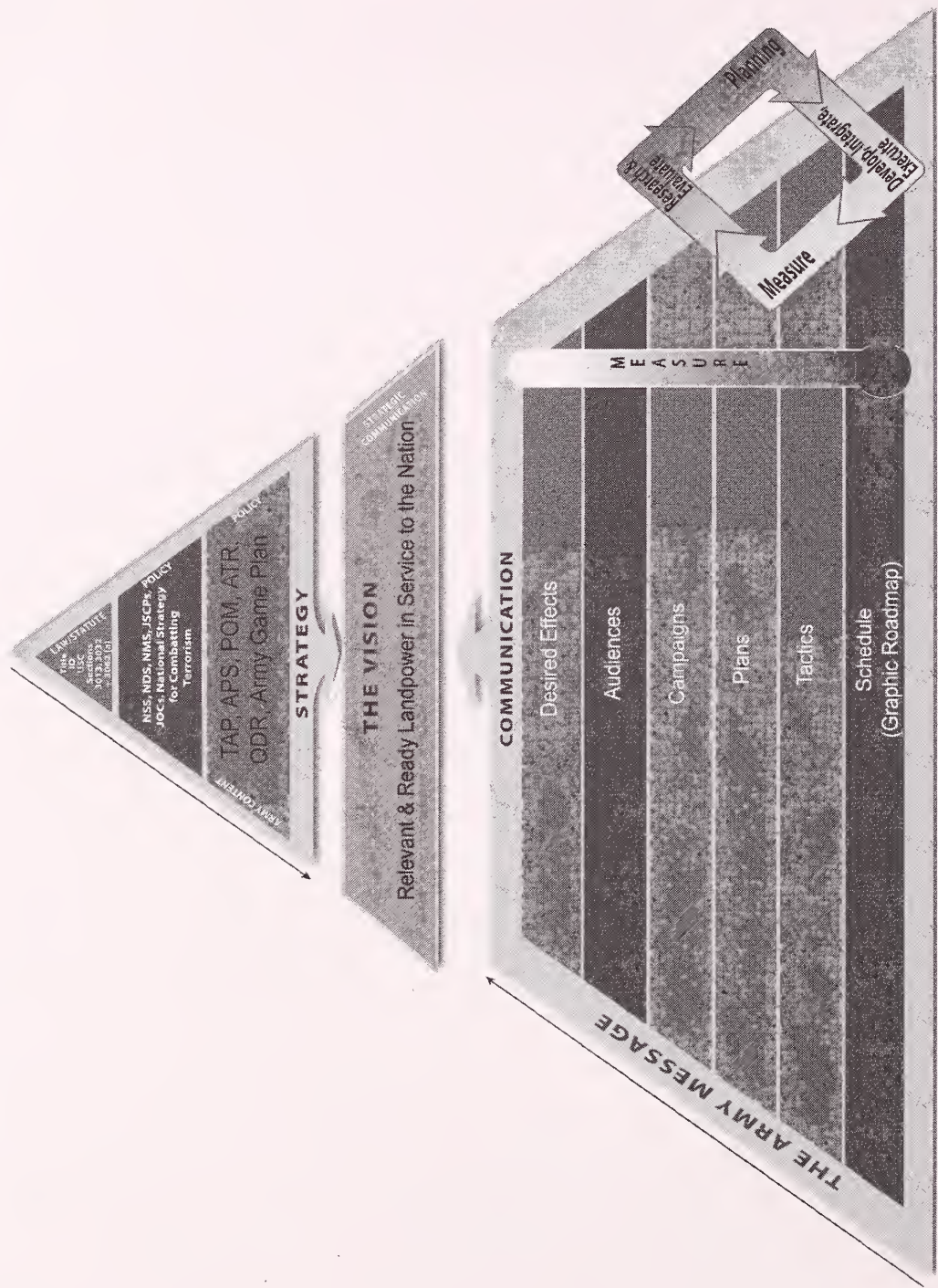
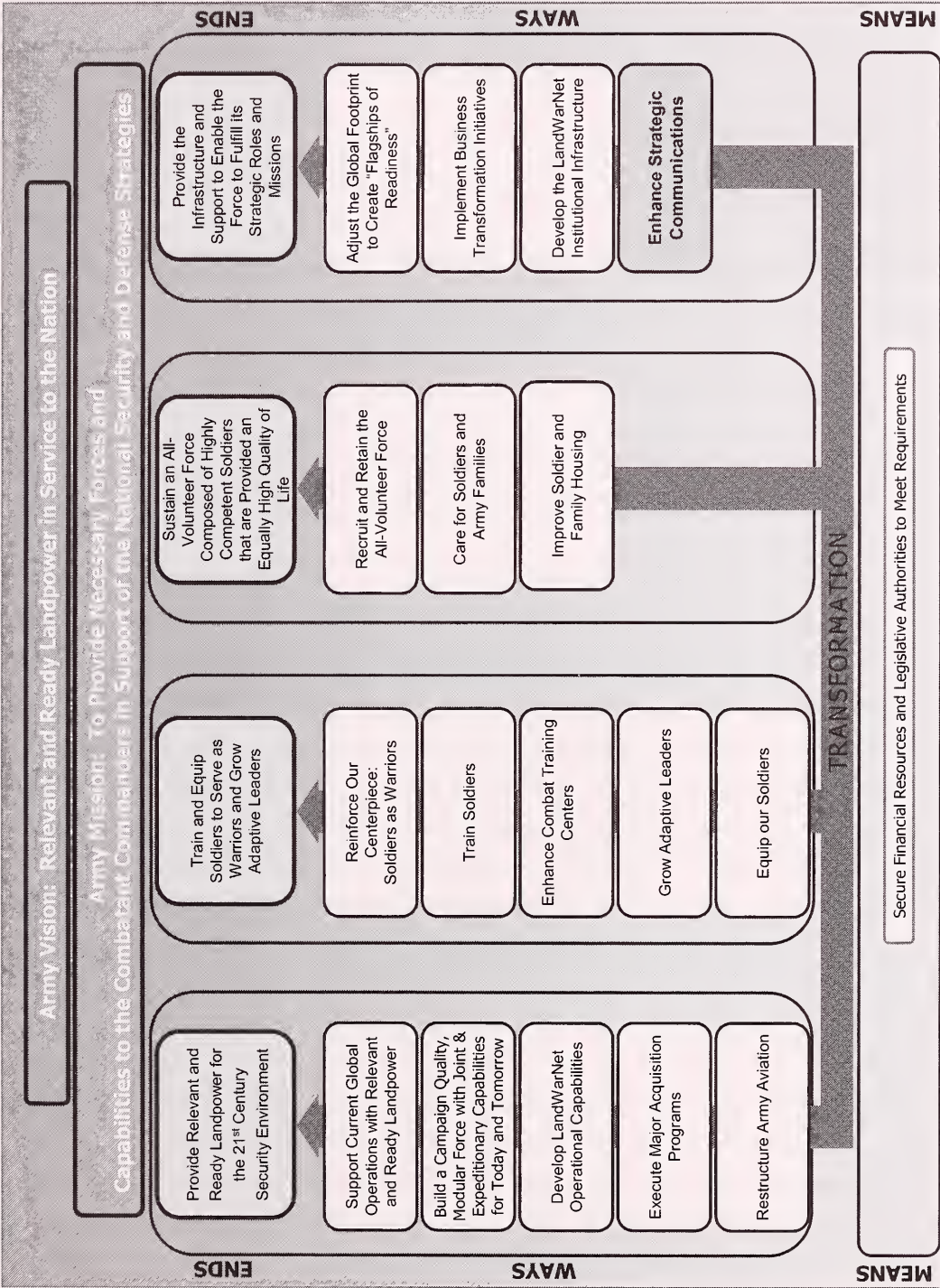


Figure 1. Linking the Power of Strategy and Communication



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Figure 2. Army Transformation

XV

Challenges of Strategic Communication

Michael A. Brown*

Successful strategic communication is vital to ensure the success of US policy abroad and at home and to restore global credibility damaged by recent scandals and our inability to compete in a global market for American ideals on a timely and relevant basis. The United States is constantly under the international microscope, and how we deal with issues like North Korea, Iran and the recent outbreak of hostilities between Lebanon and Israel is debated, discussed, supported and vilified in the international community on a daily basis. It is critical that we do not fall into the realm of “Do as I say, not as I do” as we craft our strategic message to the global community. Too often the actions we take speak louder than what we say—most especially when those actions are not consistent with our strategic message.

We need to consider many points of view when dealing with the issue of strategic communication, with generational, ideological, religious, global and regional impacts requiring a consistent and coordinated theme or message. Strategic communication is about shaping choices at many levels to avoid crisis or lessen crisis, defeat propaganda, explain a position (legally, morally or ethically) and shape the future. The message is dynamic, continually requiring assessment and change, and requires an agile and coordinated approach both horizontally and vertically through all levels of government. We can no longer focus on single areas of responsibility—every action or inaction has the potential to be global in nature. The wider

* Rear Admiral, United States Navy.

coordination of strategic communication as a consideration into all aspects of military planning and operations will not only enhance military effectiveness as a tool to advance US strategic interests, but will heighten awareness of both legal and ethical considerations that are vital in allowing the United States to regain, then maintain, the high ground in global perception management. This is where our challenge lies. We must ensure a common understanding of strategic goals/themes/messages with cooperation and message alignment across legislative liaison, interagency coordination, public affairs, fleet operations and information operations, while remaining credible and garnering trust. Key considerations are balancing credibility with ethical, legal and political considerations to create effective strategic communications policy. Slow “official” response damages credibility and undermines what is eventually released. We must plan from the beginning with an effects-based model derived from our strategic goals.

What are our liabilities when employing the news media, public opinion and the Internet as weapons of war? Who coordinates all the information activities under the strategic communication umbrella? How is it synchronized? Should it be through designated personnel in the field or at senior levels in the Pentagon or the State Department where sometimes sensitive policy decisions can be made? At what point does trading speed for “the right answer” hurt our overall strategic communication effort, when our enemies are capable of responding faster and faster? Timeliness has become critical; the hostilities in Lebanon being a prime example. Since the cessation of hostilities, Hezbollah has already made news as they begin to rebuild the damage done by Israeli missiles and provide services and funds to the people of southern Lebanon who are returning to their homes, while the United Nations is still struggling to reach a satisfactory agreement with all parties regarding a UN peacekeeping force.

Coordinating a coherent strategic message is further complicated by new media outlets such as blogs, chat rooms and text messaging, which are becoming preferred sources for information—regardless of validity—in some demographic groups, and make “managing” information release impossible. Yet they also offer new opportunities to influence key audiences and undermine adversaries. How are we to compete in this Infosphere? What is the role of the military and how do we synchronize within the government? The globalization of media and the abbreviated news cycle (anyone with a cell phone can become a potential “reporter”) can transform all levels of military operations into potentially devastating strategic liabilities (e.g., the alleged murder of Iraqi civilians by US marines in Haditha in November 2005). The public will accept some level of moral ambiguity if the stakes are high. However, if there is not a jointly negotiated, practical ethical standard of

conduct, and despite the overall legality of the undertaking, the operation can result in a tactical win but a strategic loss.

In the end, strategic communication, via public affairs, information operations and other capabilities, involves complex legal issues requiring careful review and national level coordination. We must divine the proper roles and responsibilities for all and develop a process which is both timely and meets the needs of all participants in the Department of Defense and the rest of the government. Considering the stakes involved in “fighting the long war”¹ against dispersed, global terrorist networks, the balance between ethical considerations, credibility and gain (e.g., the potential reduction in US casualties, damage to infrastructure, domestic and global economies and deterrence of enemy actions) makes strategic communication a job for all—ambassadors, Foreign Service Officers, Cabinet officials and members of Congress, as well as those of us in the Department of Defense.²

Notes

1. Department of Defense, Quadrennial Defense Review Report 9–18 (Feb 6, 2006), available at <http://www.defenselink.mil/pubs/pdfs/QDR20060203.pdf>.

2. *An Around-the-World Review of Public Diplomacy: Hearing Before the House Committee on International Relations*, 109th Congress 34–42 (2005) (statement of Karen Hughes, Under Secretary for Public Diplomacy and Public Affairs, US Department of State).

PART VII

GLOBAL DISASTERS

XVI

Global Disasters: Pakistan's Experience

Ikram ul Haq*

Introduction

The earthquake that struck Pakistan on October 8, 2005 left behind widespread devastation and enormous loss of life with extensive damage to economic assets, infrastructure and social service delivery. The devastation was spread over 30,000 square kilometers of Himalayan terrain. It affected half a million households, destroyed most of the educational institutions in the affected area and killed over 73,000 people, including 18,000 children. The majority of health care units collapsed, communications infrastructure was rendered unusable, all essential utilities were disrupted and the area was strewn with two hundred million tons of debris. Families lost their breadwinners, senior citizens were left alone to fend for themselves, children lost their parents and parents are still mourning lost and injured children. Infrastructure that took years to construct, disappeared in six minutes. The misery did not end there. Hundreds of post-earthquake tremors multiplied the shock and trauma. The administrative machinery that could have helped the victims survive the disaster, itself collapsed and perished. The rugged mountainous terrain made it more difficult and winter in the Himalayas threatened the lives of the survivors, already traumatized. This, the worst natural calamity in Pakistan's history, has changed the lives of millions and is one from which it will take many years and at a cost of billions of dollars to recover.

* Brigadier General, Pakistan Army. The views expressed in this article are those of the author alone and do not necessarily represent the views of the Pakistan government, the Pakistan Defence Force, or the Pakistan Army.

This article will focus on an assessment of the damage caused by the disaster, an examination of the impediments and challenges faced in the conception and conduct of relief operations, and the lessons that were learned.

Damage Assessment

The earthquake struck Pakistan without warning at 8:50 am (local time) on the morning of October 8, 2005. With its epicenter several miles northeast of the city of Muzaffarabad, the earthquake registered 7.6 on the Richter scale, similar in intensity to the earthquake that devastated San Francisco in 1906. Widespread destruction occurred throughout Pakistan-administered Kashmir, Pakistan's North-West Frontier Province (NWFP) and the western and southern parts of the Kashmir valley in Indian-administered Kashmir. A total of 147 aftershocks were experienced throughout that day. By October 27, that number had swelled to 978 and included aftershocks reaching intensities of up to 6.2 on the Richter scale. By early November, the official Pakistan government estimate of Pakistani dead reached 73,338, with 128,304 being injured, many very severely. The earthquake triggered landslides that literally buried entire villages and roads. Some 59 percent of the residential structures in the region were leveled, including 67 percent of education institutions in which 18,095 children perished in collapsed school buildings. Health care facilities were similarly devastated, with 63 percent of the region's medical capacity being damaged or destroyed. Rescue and recovery operations in the mountainous area were hampered by the destruction of up to 37 percent of the road infrastructure, including critical bridges. Government services were equally impacted with estimates of damage to electric capability reaching 60 to 70 percent, telecommunications 30 to 40 percent and water supply 30 to 40 percent.¹

Response Challenges

Among the major challenges that were faced in the immediate aftermath of the disaster were both institutional and informational vacuums. With respect to the former, Pakistan had a National Crisis Management Cell (NCMC), but this institution lacked the necessary resources and capacity. Once the earthquake shook Pakistan, it was soon realized that the gravity of the disaster had overwhelmed the ability of the NCMC to handle the situation. As a result, we were pretty much left in an institutional vacuum to deal with the enormity of the crisis. This institutional failing was compounded by the informational vacuum. The scale of devastation and human trauma, coupled with the idiosyncrasies of the mountainous terrain and weather, and the administrative paralysis that engulfed the region, led to an

information vacuum as to the exact nature and extent of the damage and, in turn, the appropriate response to generate. Among the major challenges faced were the rescue of the injured and the location and removal of the dead, facilitation of the rapid induction of disaster relief forces, and reaching out to remote villages, while confronting chaos in the impacted cities. To illustrate the scope of the problem, it was determined that some 470,000 tents were immediately needed to shelter the multitudes rendered homeless.

Conception and Conduct of Relief Operations

At the National Level

The ability to organize a swift response to the enormous magnitude of the destruction and suffering was made even more difficult by the reality that the existing infrastructure was either very poor or totally destroyed. Realizing the gravity of the disaster, the government immediately established the Federal Relief Commission (FRC) with a mandate to manage the entire spectrum of relief efforts. All national agencies concerned with the relief and rehabilitation efforts, including the armed forces, the cabinet ministries of health, interior and foreign affairs, as well as corresponding communication and information divisions, functioned through the FRC and formed a part of the national team. FRC served as the primary interface between the government and international organizations, as well as foreign authorities and various nongovernmental organizations (NGOs) focusing on the relief and rehabilitation of the stricken area.

The FRC was organized to work with two distinct wings, the civilian and the military. The civilian wing, comprised of ministerial representatives and coordinators, looked after the inter-department and inter-agency issues, while the military wing was responsible for the operationalization of rescue and relief efforts.

The disaster response concept consisted of four complementary strategies, i.e., search, rescue, relief and recovery; consequent management; rehabilitation; and reconstruction. The FRC focused on the first two strategies while the rehabilitation and restoration domains were addressed by the Earthquake Rehabilitation and Reconstruction Authority (ERRA). The entire effort was undertaken under one leadership platform, thereby ensuring judicious distribution of disaster relief through a synergized operation. The maintenance of law and order, the revival of civic order, and restoration and early recovery aspects of the concept were the main thrust lines. The FRC was fully supported by the nation, key players and stakeholders. The decisive vision and leadership by the government throughout the crisis provided ideal working parameters and impetus to the FRC, foreign governments, individual donors, the public and all of the governmental departments.

The approach adopted at the national level to meet the crises was premised on several distinct but interfacing considerations. The FRA functioned on the basic principle of a “one-window operation” with accessibility to all. This ensured the maximum possible coordination at both the national and operational levels to realize an economy of effort in achieving the desired results. “Reaching out” in all affected areas was given top priority. All available means of transportation, to include foot movement, animal transport, motor vehicles and helicopters, were used to “reach out” to affected people to provide systematic, timely and equitable distribution of relief goods and services. Of immediate concern as the weather deteriorated was the implementation of a strategy for the speedy construction of temporary shelters and a functioning logistic chain that extended to the forward-most places. For the first time, the government put into practice the UN “cluster approach” to managing various aspects of disaster management.² Of particular utility was the Strategic Leaders Forum consisting of the heads of the main international relief and non-governmental organizations, and individual donors.

At the Operational Level

The Pakistan Armed Forces, in general, and the Pakistan Army in particular, were responsible for all operational aspects of multi-agency and multi-organization relief efforts. Two Army infantry brigades were deployed within 24 hours of the initial shock, and within 48 hours a full division had been deployed. The decision to deploy three divisional headquarters was taken within the first 72 hours as the enormity of the task became clearer. By the end of October, over 80,000 troops were deployed in the disaster zone.

At the operational level, the relief operation was conceived and executed in three stages, with each stage gradually blending into the subsequent stage, and with considerable overlap in some areas.

Stage One (October 8–20) was the immediate rescue and relief operation. The main focus of Stage One was the rescue of survivors, the location and removal of dead bodies from the debris, the evacuation and treatment of the injured and the provision of food and shelter to those most in need. Special emphasis was placed on providing for the care and protection of vulnerable women and children.

Stage Two (October 20–December 31) concentrated on creation of stability in the face of widespread chaos. It was a very crucial effort, as Stage Two became a race against time, i.e., about 3.5 million homeless people had to be adequately provisioned and protected against the fast approaching winter. The urgency of the endeavor was reflected in the fact that the United Nations and other relief agencies were predicting a second wave of deaths due to exposure of the vulnerable population to the harsh winter. The main activities conducted during this stage were the

provision of shelter (tents and robust transitional shelters) and the creation of tent villages; providing food and medical support; distribution of monetary compensation for the dead, the injured and damaged homes; restoration of civic and social amenities and institutions, with priority given to health and education sectors; and, perhaps most importantly, bringing local government and administration back to its feet.

Stage Three (January 1–March 31) sought to ensure that the stability created during the previous stage was maintained throughout the harsh winter. Key elements of Stage Three included monitoring the provision of critical support activities to ensure that food, shelter and medical services were sustained throughout the winter and into the spring, and working to ensure a smooth transition from provision of relief to the reconstruction and rehabilitation of devastated urban and rural areas.

Reconstruction and Rehabilitation

After six months, the emergency relief phase was over and focus shifted towards rebuilding the shattered areas. The Earthquake Reconstruction and Rehabilitation Authority (commonly known as ERRA) was established to plan, coordinate, monitor and regulate reconstruction and rehabilitation activities in all earthquake affected areas. The ERRA developed a comprehensive three-year plan involving eleven development sectors, with special focus on housing, health, education and livelihood in earthquake-affected areas. Some \$3.5 billion was earmarked for that purpose, effective as of the first week of April of 2006.

The National Response

The spontaneous outpouring of compassion and generosity by the people of Pakistan, both at home and abroad, on a scale never witnessed before, helped the government meet fiscal shortfalls. Pakistanis from all walks of life stepped forward, demonstrating our nation's highest values of caring and sharing that brought consolation and hope to the affected. From soldiers and voluntary relief workers to local NGOs, the people of Pakistan stepped forward to protect and nurture the earthquake victims.

The International Response

The people of Pakistan were overwhelmed by the generosity of the response of the world community and voluntary organizations. Simply put, they have been of great support to us. I take this opportunity to praise in the highest possible terms the work of the volunteers, men and women, foreign governments, armed forces of

friendly countries, the aid workers, the international organizations, NGOs and the global civil society who worked tirelessly and selflessly to make a difference to those who suffered. We are also deeply grateful for the generous support and assistance of individual donors worldwide in providing desperately needed relief to the earthquake victims.

United States

I had the opportunity to personally observe US relief efforts while at the US Central Command (CENTCOM). The United States responded immediately and generously to Pakistan's call for assistance following the earthquake. The US military was in Pakistan on October 10, just two days after the earthquake. At the peak of the initial relief efforts, more than 1,200 personnel and 25 helicopters provided vital transport, logistics, medical and engineering support in the affected areas. US helicopters, nicknamed "Angels of Mercy," changed the dimension of relief efforts and helped save hundreds of lives. I have not the words to begin to thank the United States for its assistance. To give you some idea of the assistance provided by the United States, a total of \$510 million was pledged for earthquake relief and reconstruction efforts. Over 250 US military and civilian cargo airlift flights delivered more than 7,000 tons of medical supplies, food, shelter material, blankets and rescue equipment to Pakistan. Approximately 5,200 helicopter missions were flown, delivering 15,000 tons of supplies and transporting more than 18,000 people. US medical teams treated approximately 35,000 patients, while US engineers cleared 40,000 tons of debris, built a camp for displaced people, completed numerous sanitation projects and adopted a village that included building five schools and 50 homes. Moreover, the United States donated an 84-bed Mobile Army Surgical Hospital and established two forward-area refueling point systems to increase helicopter efficiency during reconstruction.

North Atlantic Treaty Organization

NATO was a vital part of a very large effort aimed at providing disaster relief in Pakistan. In total, some 1,000 NATO engineers and supporting staff, as well as 200 medical personnel, worked in Pakistan during the operation. NATO airlifted supplies, donated by NATO member and partner nations, as well as by the UN High Commissioner for Refugees, via two air bridges from Germany and Turkey. That critical effort required 168 NATO flights that delivered almost 3,500 tons of relief supplies. NATO helicopters transported more than 1,750 tons of relief goods to remote mountain villages and evacuated over 7,650 disaster victims. A NATO hospital treated approximately 4,890 patients and conducted 160 major surgeries, while mobile NATO medical units treated 3,424 patients in the remote mountain

villages. NATO also contributed significantly to the World Health Organization immunization program that has helped to prevent the outbreak of disease. NATO engineers were active in repairing nearly 60 kilometers of roads and removing over 41,500 tons of debris, thereby enabling the flow of aid, commerce and humanitarian assistance. NATO engineers also supported the Pakistan Army in Operation Winter Race, by constructing 110 multi-purpose shelters for the population living in the mountains. An additional nine school and health structures were completed and thirteen tent schools erected. NATO also set up an aviation fuel farm in Abbottabad, which carried out some 1,000 refuelings for civilian and military helicopters.

Lessons Learned

Combating the disastrous earthquake has been a unique and challenging experience, which fostered many lessons that can serve as guidelines for dealing with such a calamity in the future. Among the lessons that have universal application are those concerned with government institutions, disaster management strategy, expeditious acquisition of information, the role of the media, mobilization and deployment of friendly forces, cooperation with friendly armed forces and nations, capacity building and the development and enforcement of design codes.

Institutions

Creation of the FRC within the Prime Minister Secretariat, which works directly under the prime minister, has been a success story. A proposal is now under active consideration to create a permanent National Disaster Management Authority (NDMA), with appropriate legislative authority to work directly under the Prime Minister's Secretariat. Similar disaster management capabilities are likely to be established at the provincial level, to include control centers with requisite facilities. Each will be maintained by a small nucleus staff, which can be suitably augmented during a crisis.

Disaster Management Strategy

A well-thought-out and comprehensive disaster management strategy, encompassing the likely scenarios, delineation of responsibilities and capacity-building guidelines must be evolved.

Expeditious Acquisition of Information

Expeditious acquisition of information regarding the extent of damage to essential infrastructure can greatly assist in the provision of rapid and effective relief and

rescue. It soon became apparent that serious information shortfalls existed in our system. Our experience demonstrates that up-to-date data pertaining to housing, civic facilities and other details about each area should be available in the national database. Clearly, this would be most useful for rapid damage assessment.

Some capability to undertake rapid mapping and damage assessment in the disaster zone should be created. High-resolution satellite imagery/aerial photography could prove crucial to ascertaining the location and nature of the damage sustained.

Role of the Media

The media can make a major contribution in any relief operation. The main areas of media contribution during the earthquake relief operation in Pakistan included the transmission of graphic images of the destruction and the miseries of the affected populace and timely, on-scene reports of the progress of relief and recovery operations. Media reporting of the devastation stirred up great emotions within the country, which created a flood of relief activity. Similarly, the international media was able to mobilize the relief effort at the international level.

Local media acted as a potent watchdog on the progress of the relief and recovery operation. Although at times unfairly critical, the media helped in keeping us on our toes. Lastly, sustained media coverage proved instrumental in keeping donors, both national and international, motivated to continue their generous support.

Mobilization and Deployment of Friendly Forces

Disaster management is basically a race against time. Mobilization and deployment of some friendly forces took as long as two months because of the limited capability of the providing nation to mobilize sooner. It is recommended that nations and alliances having the potential—and the will—to provide much needed assistance develop the capability for rapid deployment for timely disaster response.

Cooperation with Friendly Armed Forces and Nations

The support received from friendly nations and their armed forces proved to be extremely useful. This reality highlights the need to formalize mechanisms for more effective cooperation and coordination should the need arise in the future. To that end, peacetime agreements with friends and allies with the potential to assist in disaster management and the willingness to do so must be in place before disaster strikes. These agreements should include memoranda of understanding between participating nations pledging delineated capabilities. This, in turn, will facilitate the conduct of joint mock disaster relief exercises.

A multinational forum to share disaster relief and recovery experiences with each other should be created. Many nations have suffered major disasters in the recent past. There is much that can be learned through the sharing of each other's experiences.

Capacity Building

Although some agencies in Pakistan had the experience and appropriate potential to assist in disaster management, it became painfully apparent that they did not possess the expertise nor were they equipped to handle a large-scale earthquake. Accordingly, additional capacity must be created, both in trained manpower and in equipment, for specific disaster relief and rescue tasks.

Development and Enforcement of Design Codes

The extent of damage in a major calamity can be greatly reduced if residential and commercial buildings are constructed in accordance with proper architectural designs. There is a clear and impelling need to develop building design codes based upon rigorous scientific studies. Effective provision must then be made for their enforcement through legislative measures.

Conclusion

As noted previously, Pakistan was overwhelmed by the caring and enthusiasm of the world community and voluntary organizations which have been so generous in providing desperately needed relief to the earthquake victims. Having transitioned from the relief and crisis control stage to the rehabilitation and reconstruction phase of the recovery, the Government of Pakistan is maintaining its thrust to reintroduce the normalcy of life through the revival of essential infrastructure and the civil order. At the same time, we are brainstorming a permanent "Disaster Management Agency" for preparedness and coordination of a coherent response to any future challenge.

Notes

1. Depictions of the widespread human and physical devastation caused by the earthquake are available at http://en.wikipedia.org/wiki/2005_Kashmir_earthquake (last visited Mar. 12, 2007).

2. See Action Aid International, The Evolving UN Cluster Approach in the Aftermath of the Pakistan Earthquake: an NGO Perspective, available at <http://www.actionaid.org/pakistan/images/ActionAid%20Report%20on%20UN%20Cluster%20Approach%20April%202006.pdf> (last visited Mar. 12, 2007).

XVII

Australian Defence Force Experience with Non-Government Organizations in Humanitarian Assistance and Disaster Relief Operations

Evan Carlin*

Recent experience suggests that humanitarian assistance and disaster relief operations are a growth industry for military forces. In the last 12 months alone, the Australian Defence Force (ADF) has provided emergency aid to victims of the Pakistan earthquake; the Indian Ocean tsunami; the Nias, Indonesia earthquake (in which nine ADF personnel died in a helicopter crash); and Cyclone Larry, a category 5 tropical cyclone that tore across the north Queensland coastline of Australia in early 2006.

Figures from the World Health Organization's Centre for Research on Epidemiology of Disasters show that from 1990 to 2003 there was a 180% increase in the number of people affected by natural disasters: 255 million people in 2003 up from 90 million in 1990.¹ Between 1990 and 2000 in Asia alone there were 215 so-called "non-complex" relief operations (floods, earthquakes, volcanic eruptions, etc., where host nations were the primary responders).² Operation Shaddock, for

* Lieutenant Colonel, Australian Defence Force. The author is not authorized, nor does he purport, to speak for the Australian government or the Australian Defence Force.

example, saw the ADF come to the aid of Papua New Guinea following a tsunami on July 17, 1998 that killed over 3,000 people.

Complex relief operations, on the other hand, involve the delivery of humanitarian assistance to societies riven by warring factions, civil disorder or population displacement, any or all of which problems might be compounded by the misery of a natural disaster. One example is the multinational force led by the ADF to render humanitarian aid, provide security and instill the rule of law in guiding Timor-Leste to become the first new nation of the twenty-first century.

However one might categorize emergency relief operations, it is traditionally the case that military forces are called upon to provide the humanitarian or disaster aid required often with little, or indeed no, notice. Military forces have the resources at hand to quickly reach inaccessible places. But increasingly, some non-government organizations (NGOs) rival the capacity of military forces to transport large volumes of supplies in relief operations. The Brookings Institution cites a case in point: "During the highly visible airlift of food into Afghanistan during the winter of 2001–02, the U.S. military delivered only a tiny fraction of the total brought in through conventional operations by WFP [World Food Program] and NGOs like IRC [International Red Cross]."³ Not only do such NGOs have the capacity to deliver aid where required—they can do it cheaper than military forces.

Perhaps relief operations should be left to specialist NGOs. This is the preference of some NGOs, such as *Médecins Sans Frontières*, who seek to provide aid relief unencumbered by politics and military association. This would permit military forces to maintain their focus on their core function of warfighting. Military forces usually are only too pleased to hand over the reins of relief operations as soon as practicable to NGOs or UN agencies. For some time the United States has been uneasy about the resources of its armed forces being diverted from its core function, as noted by the US Congressional Research Service (CRS):

For over a decade, some Members of Congress have expressed reservations about U.S. military involvement in peacekeeping. The Bush Administration's decision to reduce the commitment of U.S. troops to international peacekeeping seems to reflect a major concern: that peacekeeping duties [defined by the CRS to include "providing security for humanitarian relief efforts"] are detrimental to military "readiness," i.e., the ability of U.S. troops to defend the nation.⁴

Certainly there is no shortage of NGOs around the world ready and willing to assist in relief operations. It is estimated that within three weeks of the 2004 Boxing Day tsunami in Southeast Asia there were over 109 NGOs operating in Indonesia, 84 in Sri Lanka and 35 in Thailand.⁵

The fact remains, of course, that military forces are indispensable for relief operations in hostile or uncertain security environments. Moreover, despite the capacity of NGOs for economical long-term lease of aircraft in relief operations, military forces are unmatched in their ability to rapidly deliver aid to remote places, particularly in the maritime environment. The day after the 2004 tsunami, Australian soldiers departed for Sumatra and within a week had established a water purification plant in Banda Aceh. Military forces have the capacity to bring instantaneous infrastructure to a devastated area. As simply stated in Royal Australian Navy doctrine: “Naval forces are self-supporting and do not create logistic burdens in situations where infrastructure has been destroyed or severely damaged.”⁶

The *NATO Review* neatly assessed the military contribution to relief operations in these terms:

The recent disasters in the United States and Pakistan have highlighted how useful certain military capabilities can be when first responders find themselves overwhelmed. Strategic airlift is crucial to transport urgently needed relief supplies as commercial aircraft are not always available in sufficient numbers. Moreover, helicopters have proven essential in the first phase of a disaster-relief operation when roads are often too badly damaged to be passable and sealift capabilities are critical to sustaining the relief effort in a more cost-effective way in the weeks and months following a disaster. Rapidly deployable military hospitals and medical personnel can also help out overburdened first responders. In addition, military engineers, water purification units and search-and-rescue teams all have the skills that can greatly improve crisis-response capabilities and save lives.⁷

Whether wrought by climate change or happenstance, the world has recently witnessed a succession of natural disasters of such scale as to pose transnational challenges that require international cooperation and understanding. This need was clearly evident in the most devastating of these disasters, the Indian Ocean tsunami of Boxing Day 2004.⁸ The tsunami was triggered by an enormous undersea earthquake (9.3 on the Richter scale) that ruptured the earth’s crust for over 1,000 kilometers, releasing tremendous energy. This, the second most powerful earthquake ever recorded,⁹ generated a tsunami whose destruction in the immediate region was shocking, and a global tragedy.

What frameworks exist for civilian-military and international cooperation in relief operations? On December 19, 1991, UN General Assembly Resolution 46/182¹⁰ created the Department of Humanitarian Affairs, designed to strengthen the coordination of humanitarian emergency assistance. The resolution outlined 30 guiding principles “in accordance with the principles of humanity, neutrality and impartiality”¹¹ for the provision of relief aid. It reaffirmed the primary responsibility of States

to care for the victims of natural disasters within their borders but asserted that “the United Nations has a central and unique role to play in providing leadership and coordinating the efforts of the international community to support the affected countries.”¹² The resolution makes it clear that coordination is the key tool in humanitarian operations.

The UN Charter makes no specific reference to the use of military forces in humanitarian operations. There is an inherent tension between the roles of civilian agencies and military forces in relief operations. This was evident, for example, in 1994 during Operation Restore Hope in which US military and international civilian aid agencies worked through a Civil Military Operations Center (CMOC) to overcome their “cultural differences” for the common good of Rwandan refugees in Zaire.¹³

In a perfect world there should naturally be complementarity between military forces and NGOs in relief operations. The Geneva Conventions and their Additional Protocols¹⁴ refer to impartial relief societies concerned with the provision of humanitarian aid and the protection of relief agency personnel. Surely this provides common ground with military forces whose duty it is to protect civilians under the law of armed conflict.

In 1994 the Oslo Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief¹⁵ were adopted by various nations to provide effective interaction of military and civilian actors in disaster relief operations. In subsequent years, the Oslo Guidelines were developed by the UN’s Office for the Coordination of Humanitarian Affairs (OCHA). After a review of a number of operations, OCHA conceded that in a range of international relief operations:

[T]he coordination between the international military forces and the responding UN humanitarian agencies and other international civilian actors has been critically examined by a number of participants and observers and found to be in need of improvement. The success that was achieved in the use of military resources and coordination was due largely to the extraordinary efforts of the personnel in the field.¹⁶

Also in 1994, the International Red Cross and Red Crescent Movement published its Code of Conduct for disaster relief operations.¹⁷ This code stipulates ten principles founded upon the need for impartiality—that aid should be given on the basis of and in proportion to need alone.

The conduct of civil-military relief operations requires impartiality and cooperation but also cultural sensitivity and political sagacity. This was evident no more so than in the international relief operation in the wake of the 2004 Boxing Day tsunami.

About 250 kilometers from the epicenter of the earthquake, Aceh suffered the full brunt of the tsunami's force. This was a catastrophe in one of the most isolated and politically charged areas of Southeast Asia and a source of political instability for more than a century.¹⁸ Before the arrival of international aid workers, the Indonesian government had quarantined Aceh. Indonesian forces regularly clashed with the Free Aceh Movement, or GAM, rebels. The local population is as devoutly Muslim as anywhere in the world and Sharia law is in force. For nearly three decades, Aceh was embattled, silent and closed off from the outside world. The earthquake and tsunami left survivors devastated and prey to the entreaties of al-Qaida and Jamah Islamia, whose members, undoubtedly, were gathering to hand.

The first foreigners on the scene and with the greatest lift capacity were forces from Australia, Singapore and the United States. Troops were unarmed and relied upon Indonesian security to conduct relief operations. As an Indonesian commander remarked, "If you want to carry a weapon, you'd better choose a side." During the three months that the ADF conducted relief operations in Aceh, some 200 people were killed in skirmishes between GAM and Indonesian forces.

It was into this situation that thousands of troops and hundreds of civilian relief workers descended. While foreign forces and NGOs scurried to organize themselves, stoic Indonesian soldiers set about the grimmest of tasks, tirelessly clearing waste and debris and disposing of the dead in accordance with local practice. Many of these soldiers had themselves lost loved ones. Many had no family or homes to which to return. When the tsunami struck, Indonesian troops were conducting an amphibious landing exercise. All those soldiers perished, along with some 1,000 of their comrades at their headquarters at Banda Aceh. Offshore the *USS Bonhomme Richard* Expeditionary Strike Group and *USS Abraham Lincoln* provided considerable muscle and heavy lift. US Navy aviation assets were crucial to the aid effort.

The ADF's primary concern was to ensure that the relief effort was in accordance with Indonesian priorities. The view that Indonesians knew best what Indonesians required was a fundamental precept of Australian, Singaporean and American forces. Through the Civil-Military Aid Coordination Conference (CMAC) this view was shared by other foreign forces and the majority of NGOs. The CMAC met daily in Medan, the transport hub of northern Sumatra. An Indonesian colonel, with an Australian lieutenant colonel as deputy, chaired the meetings. The CMAC was the principal means of sharing information about the progress of the mission, road conditions, security concerns, aid priorities, bottlenecks and expectations.

Expectation management was a prime concern for the CMAC. The thousands of military and civilian aid workers who descended upon Indonesia burned with the desire to help. The mood was reflected by Dr. Fiona Terry, founder of the Australian section of *Médecins Sans Frontières*: “Humanitarian action is more than a technical exercise at nourishing or healing a population defined as in need; it is a moral endeavor based on solidarity with other members of humanity.”¹⁹ The role of the CMAC (and its Secretariat comprised initially of ADF, Singaporean and US officers, with representatives of the Australian Government Aid Program (AUSAID), the US Agency for International Development (USAID) and the UN Joint Logistic Centre (UNJLC)) was to manage the prosaic but crucial tasks of setting priorities, allocating scarce air assets and ensuring that relief supplies were efficiently and effectively distributed.

In those early weeks of the operation, certain misconceptions about the needs of Aceh proved difficult to dispel. It fairly quickly became evident that the survivors suffered relatively few serious injuries and that there were sufficient medical staff and equipment for their needs. It proved challenging to stem the tide of doctors and nurses to the region. The real needs were engineers for reconstruction, environmental health officers to counter disease and qualified NGOs to manage the camps of displaced persons.

A considerable amount of aid donated from around the world was undoubtedly well intended but misguided. The warehouses in Medan were brimming with sweaters, Western-style tinned baby food, hillocks of canned baked beans, crates of boiled fruitcake and mounds of precooked meals for which the people of tropical Aceh had neither the need nor the appetite. Truckloads of disposable diapers were a mystery to these people and contributed yet more waste in a region blanketed in litter. The pressing need was, in fact, for dried fish, rice noodles, powdered milk and cloth diapers.²⁰

The best NGOs were informed, organized and relatively self-sufficient. In particular, the International Organization for Migration (IOM) had vehicles and was well organized. The World Food Program (WFP) had aircraft and their own temporary accommodation. The Red Cross and Red Crescent Movement and *Médecins Sans Frontières* were experienced, politically informed and focused on finding solutions, and Caritas efficiently directed its energies to pastoral care.

The NGOs who experienced the most frustration and were perhaps less effective were those who were impractical, ignorant of Sharia law, failed to calibrate security concerns into their plans, complained that the Indonesian government did not understand them and failed to appreciate that a humanitarian disaster must be addressed in its context. Some NGOs, in their callow enthusiasm, failed to appreciate that the consent of any nation to welcome large and diverse numbers of

international military and civilian relief workers is rarely unconditional and open-ended. The most egregious error by a few naive aid workers was to unilaterally set off for Aceh by road through Sumatran jungles only to break down and themselves become “secondary victims” of the disaster requiring assistance.

The most effective NGOs were not necessarily the large, established organizations. A capable group of well-connected volunteers from a Sydney suburban council proved effective. Surfers Without Borders diligently hired boats and accessed the otherwise inaccessible parts of western Sumatra to paddle ashore with supplies. And, improbably, Save the Sumatran Orangutans delighted the CMAC by arriving with a sumptuous swag of donations to put to good use—for humans.

The ADF completed its mission in Aceh in three months. “Completed,” of course, is a relative term. The measure of success in relief operations is a matter of delivering the greatest good in the time available. The CMAC worked efficiently, certainly diligently, and aid was directed purposefully and quickly. It proved an effective mechanism, as OCHA describes, for bridging the “humanitarian gap between the disaster needs that the relief community is being asked to satisfy and the resources available to meet them.”²¹

Notes

1. Sálvano Briceño, Director, United Nations Inter-agency Secretariat of the International Strategy for Disaster Reduction (UN/ISDR), Statement at the Conference on Education, United Nations Educational, Scientific and Cultural Organization (UNESCO), International Bureau of Education (IBE), Geneva (Sept. 9, 2004).

2. Report from the Conference on Evolving Roles of the Military in the Asia-Pacific (Mar. 28–30, 2000), Honolulu, Hawaii, hosted by the Asia-Pacific Center for Strategic Studies, *available at* http://www.apcss.org/Publications/Report_Evolving_Roles.html.

3. Steven Hansch, *Humanitarian Assistance Expands in Scale and Scope*, in *SECURITY BY OTHER MEANS: FOREIGN ASSISTANCE, GLOBAL POVERTY AND AMERICAN LEADERSHIP* (Lael Brainard ed., 2006).

4. Nina M. Serafino, *Peacekeeping and Related Stability Operations: Issues of U.S. Military Involvement*, Congressional Research Service (Oct. 4, 2004), *available at* <http://www.senate.gov/~hutchison/IB94040.pdf>.

5. Commander, US Navy Warfare Development Command, Tactical Memo 3-07.6-05, Humanitarian Assistance/Disaster Relief Operations Planning 4-2 (2005), *available at* http://www.au.af.mil/au/awc/awcgate/navy/tm_3-07-6-05_navy_ha&dr_ops_plng.pdf.

6. AUSTRALIAN MARITIME DOCTRINE - RAN DOCTRINE 1 - 2000, ch. 7 (D.J. Shackleton ed., 2000), *available at* <http://www.navy.gov.au/spc/amd/amdintro.html>.

7. Maurits Jochems, *NATO's Growing Humanitarian Role*, NATO REVIEW, Spring 2006, <http://www.nato.int/docu/review/2006/issue1/english/art4.html>.

8. The 2004 Boxing Day tsunami is listed by the Congressional Research Service as the sixth-deadliest natural disaster since 1900:

Date	Location	Event	Estimated Fatalities
July 1931	China	Flood	3.7 million
July 1959	China	Flood	2 million
July 1939	China	Flood	500,000
Nov. 12, 1970	Bangladesh	Cyclone	300,000
July 27, 1976	China	Earthquake	242,000
Dec. 26, 2004	Indian Ocean	Earthquake and Tsunami	224,495

[Note: Other figures estimate the tsunami death toll at between 229,866 and 275,000]

May 22, 1927	China	Earthquake	200,000
Dec. 16, 1920	China	Earthquake	180,000
Sep. 1, 1923	Japan	Earthquake	143,000
1935	China	Flood	142,000

Daniel Kronenfeld & Rhode Margesson, *The Earthquake in South Asia: Humanitarian Assistance and Relief Operations* 20, Congressional Research Service (Mar. 24, 2006), available at <http://www.whrpr.org/NLE/CRSreports/06May/RL33196.pdf>.

9. The most powerful earthquake recorded was one measuring 9.5 that struck Chile in 1960. Seth Stein & Emile Okal, *Size and Speed of the Sumatra Earthquake*, NATURE, Mar. 3, 2005, at 434, 581.

10. Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/582, U.N. Doc. A/RES/46/182 (Dec. 19, 1991).

11. *Id.*, Annex, Guiding Principles, para. 2.

12. *Id.*, Annex, Guiding Principles, para. 12.

13. John E. Lange, *Civilian-Military Cooperation and Humanitarian Assistance: Lessons from Rwanda*, PARAMETERS, Summer 1998, at 106.

14. See, e.g., Common Article 3 of Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [Geneva Convention III]; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [Geneva Convention IV]; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively. See also Article 17 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; and Article 18 of Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609; *reprinted in id.* at 419 and 481, respectively.

15. An updated (November 2006) version of the 1994 Oslo Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief is available at [http://www.reliefweb.int/rw/lib.nsf/db900SID/AMMF-6VXJVG/\\$FILE/OCHA-Nov2006.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/AMMF-6VXJVG/$FILE/OCHA-Nov2006.pdf?OpenElement).

16. OCHA, <http://ochaonline.un.org/> (last visited Aug. 27, 2006).

17. See Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, *available at* <http://www.gdrc.org/ngo/codesofconduct/ifrc-codeconduct.html>.

18. In 1883 when Krakatoa exploded in the Sunda Strait, the noise impelled the Dutch garrison at the other end of Sumatra to battle stations, they having assumed that Achinese insurgents had blown up a local fort. See SIMON WINCHESTER, *KRAKATOA: THE DAY THE WORLD EXPLODED* 264 (2003).

19. FIONA TERRY, *CONDEMNED TO REPEAT? THE PARADOX OF HUMANITARIAN ACTION* 244 (2002).

20. For further discussion of these issues, see Steven Hansch, *Humanitarian Assistance Expands in Scale and Scope*, in *SECURITY BY OTHER MEANS*, *supra* note 3.

21. November 2006 version of the 1994 Oslo Guidelines, *supra* note 15, at 7.

XVIII

Disaster Response: Key Legal Issues for US Northern Command

Kurt Johnson*

Introduction

During Labor Day weekend 2005, Hurricane Katrina had its own impact in Colorado Springs, Colorado. Over 100 men and women worked at a feverish pace in the Joint Operations Center and the Combined Intelligence Fusion Center at US Northern Command (NORTHCOM) as New Orleans residents were threatened by floodwaters creeping up to their rooftop safe havens. Similar scenarios were repeated for days.

As this was the first time within the United States that a natural disaster of this proportion had involved NORTHCOM, unique issues arose regarding the use of Department of Defense (DoD) resources and capabilities in support of hurricane relief operations within the United States. This article discusses NORTHCOM's missions, authorities and significant legal issues associated with defense support of civil authorities during disaster relief operations.

Dual Missions

NORTHCOM is a unique geographic combatant command as it has dual missions—homeland defense (HLD) and defense support of civil authorities (DSCA)—that must be performed in our nation's homeland. The legal authority for

* Captain, JAGC, US Navy.

NORTHCOM's HLD mission is rooted in Article II, Section 2 of the US Constitution: the President's authority as Commander-in-Chief. The legal authority for the DSCA mission is based in statute. An example is the Stafford Act.¹

Legal Authorities

Stafford Act

The Stafford Act is the primary legal authority for federal emergency and disaster assistance to state, local and tribal governments. Under the Act, federal disaster relief may be initiated in four circumstances:

- a. Presidential declaration of a major disaster² at the request of a governor,³
- b. Presidential declaration of an emergency⁴ at the request of a governor,⁵
- c. Secretary of Defense (SECDEF) utilization of DoD resources, upon request of a governor and at the direction of the President, to perform emergency work for the preservation of life and property during the immediate aftermath of an incident (before the President makes a major disaster or emergency declaration),⁶ or
- d. Presidential declaration of an emergency when the affected area is one in which "the United States exercises exclusive or preeminent responsibility and authority" under the Constitution or laws of the United States.⁷ The President may make this declaration on his own volition without a governor's request.

In the first two circumstances, the Stafford Act requires that the governor of an affected state request a presidential declaration of a major disaster or emergency. The governor's request must be based on a finding that the disaster "is of such severity and magnitude that effective response is beyond the capabilities of the state and the affected local governments and that Federal assistance is necessary."⁸ The governor must certify that he or she has executed the state's emergency plan and will comply with the cost-sharing requirements of the Stafford Act. The President may then declare that a major disaster or emergency exists.

Upon the declaration of a major disaster or emergency, the governor and the Federal Emergency Management Agency (FEMA) Regional Director execute a FEMA-state agreement.⁹ The agreement describes the incident, the period for which assistance will be made available, and the type and extent of the federal assistance. It also contains the commitment of the state and local government(s) with

respect to the amount of funds to be expended. An emergency is an event that does not qualify under the definition of major disaster.¹⁰ Assistance authorized by an emergency declaration is limited to immediate and short-term assistance essential to save lives, to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.¹¹ Total assistance provided in any given emergency declaration may not exceed five million dollars, except when FEMA determines that continued emergency assistance is immediately required; there is a continuing and immediate risk to lives, property, public health and safety; and necessary assistance will not otherwise be provided on a timely basis.¹²

The third circumstance occurs in the immediate aftermath of an incident which may ultimately qualify for Stafford Act assistance but before the President actually makes a major disaster or emergency declaration. The governor may request DoD resources to perform emergency work on public and private lands that is essential for the preservation of life and property.¹³ “Emergency work” is defined as including “clearance and removal of debris and wreckage and temporary restoration of essential public facilities and services,”¹⁴ but may also include search and rescue, emergency medical care and reduction of immediate threats to life, property and public health and safety.¹⁵

The fourth circumstance that initiates federal disaster relief does not require a request from a governor.¹⁶ The President may declare an emergency and provide federal assistance to the governor when the affected area is one in which “the United States exercises exclusive or preeminent responsibility and authority.”¹⁷ The President is required to consult the governor, if practicable, to determine if an emergency exists. President Clinton exercised this authority in the aftermath of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.¹⁸ This was the first and only use of this authority since its inception in 1988 and was likely used because the Murrah was a federal building housing multiple federal agencies.

In comparing the power of the federal government with that of the states in terms of disaster response and assistance, one must consider the Tenth Amendment to the US Constitution, which reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” State and local governments derive their authority to respond to disasters and emergencies and to enforce law from their “police power,” which is inherent in the sovereignty of every state and is reserved to the states through the Tenth Amendment. The Stafford Act affirms the primacy of the state’s role in disaster response, because federal assistance is premised on a request from the state governor and is not imposed on the state, except in those cases where the federal government exercises exclusive or preeminent authority over the area affected.

NORTHCOM's dual missions present an interesting spectrum of authority within which to act. The line between civil support and homeland defense is not easily distinguishable and often one leads into, or overlaps with, the other. In responding to a major disaster or emergency, authorities must decide if DoD's role is one of civil support or homeland defense, which of course depends on the nature of the major disaster or emergency. One can think of a number of scenarios where this determination could go either way. Without limiting DoD's national defense mission, Homeland Security Presidential Directive (HSPD) 5 establishes a presumption that domestic incidents including "terrorist attacks, major disasters, and other emergencies" shall be addressed by the US government in a single, comprehensive response, with the Secretary of Homeland Security acting as principal federal official and coordinating all federal operations in response and recovery.¹⁹

National Response Plan

Where DoD's civil support mission is clear, it begins with the National Response Plan (NRP).²⁰ Under the NRP, incidents begin as local events with local police, fire and emergency medical services as the first responders. If these first responders are overwhelmed, they request assistance from the governor of the state. The governor may choose to deploy his/her state's National Guard to assist, and may also rely on assistance from other states if an Emergency Management Assistance Compact (EMAC) exists.

An EMAC is an agreement among member states that outlines the legal agreements and procedures for providing assistance to other member states in the event of an emergency or disaster. It was established in 1996, has weathered the storm when put to the test, and stands today as the cornerstone of mutual aid. The EMAC mutual aid agreement and partnership between states exist because from hurricanes to earthquakes, wildfires to toxic waste spills, and terrorist attacks to biological and chemical incidents, all states share a common enemy: the threat of disaster.

Since being ratified by Congress and signed into law in 1996, 50 states, the District of Columbia, Puerto Rico and the Virgin Islands have enacted legislation to become members of EMAC. EMAC is the first national disaster-relief compact to be ratified by Congress since the Civil Defense and Disaster Compact of 1950.

The strength of an EMAC and the quality that distinguishes it from other plans and compacts lies in its governance structure, its relationship with federal organizations, states, counties, territories and regions, and the ability to move just about any resource one state has to assist another state, including medical resources.

If the state is overwhelmed or the governor determines specific assistance is needed from the federal government, the governor will call the President or his staff and request a declaration of major disaster or emergency. The President will

turn to the Secretary of Homeland Security, who will take the appropriate action for incident management. The primary federal agency, most often FEMA, may request military support through the Office of the Secretary of Defense. The Joint Director of Military Support (JDOMS) will evaluate the request based on legality, lethality, risk, readiness, budget and appropriateness.²¹ If approved, SECDEF will give the mission to NORTHCOM and NORTHCOM will support the primary federal agency as directed. It should be clearly understood that the National Response Plan is only a plan. It does not provide statutory authority under which DoD may expend federal funds and take action.

Posse Comitatus Act

Although civil support within the homeland is not new to the military, the nature of support needed during the 2005 hurricane season presented some unique issues for NORTHCOM. Whenever military operations are conducted within the homeland, authorities must consider the Posse Comitatus Act (PCA).²² Since the Constitution leaves police power to the states, the PCA ensures that the Army and Air Force are not used as a police power. The PCA applies to the Navy and Marine Corps by DoD policy. The PCA restrictions essentially prohibit the direct, active participation of military forces in enforcing civil criminal laws. This includes prohibitions against arrest, search and seizure, and detention. The PCA does not apply to the Coast Guard.²³ It also does not apply to the National Guard in state active duty (SAD) or Title 32 (Federally Funded) statuses. Congress has provided many exceptions to the PCA, most notably the Insurrection Act.²⁴ Although there has been much discussion of amending the PCA, NORTHCOM's position is that its ability to execute its mission is not adversely affected by PCA restrictions.

Enforcement of the Laws to Restore Public Order

The John Warner National Defense Authorization Act for Fiscal Year 2007 (NDAA FY07) changed the name of chapter 15 of Title 10 from "Insurrection" to "Enforcement of the Laws to Restore Public Order."²⁵ Formerly and commonly referred to as the Insurrection Act statutes, 10 US Code 331-333 provides statutory exceptions to the PCA that could involve the execution of NORTHCOM's civil support mission. During Hurricane Katrina, early news coverage depicted a city of lawlessness: police were gone, looting was common and violence was rampant. This news coverage led to discussions about whether the President should invoke the Insurrection Act. As the Insurrection Act statutes existed at the time of the Hurricane Katrina disaster, it did not appear that legal authority existed for the President to invoke the Insurrection Act.

The Insurrection Act statutes describe three triggers that allow the President to use military force to suppress insurrections. The first trigger is a state request, as was done in the 1992 Los Angeles riots.²⁶ The second trigger is when unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce federal law.²⁷ This was done in the 1957 and 1963 public school desegregation cases. The third trigger, now expanded as a result of language in the Fiscal Year 07 National Defense Authorization Act, allows the President to restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that domestic violence has occurred to such an extent that the authorities of the State or possession are incapable of maintaining public order, and such violence results in a condition that deprives the people of constitutional rights or obstructs execution of US laws.²⁸ The President may also do so to suppress in a state any insurrection, domestic violence, unlawful combination, or conspiracy, if such insurrection, violation, combination or conspiracy results in a condition that deprives the people of constitutional rights or obstructs execution of US laws.

Where the President invokes the “Laws to Restore Public Order” because public order cannot be maintained and the violence deprives people of constitutional rights, the President may federalize the National Guard and Reserve for not more than 365 days. He may also direct SECDEF to provide supplies, services and equipment to affected persons (independent of the normal process under the Stafford Act).

Although the new provisions of the NDAA FY07 expanded the President’s authority, the provisions would not necessarily have completely addressed the “lawlessness” situation that existed in New Orleans during Hurricane Katrina. Under the new provisions, the President would have had two significant hurdles to overcome before he could invoke the “Enforcement of the Laws to Restore Public Order” provisions that now exist and send in Title 10 troops over the objection of or absent a request from the governor. While the first hurdle would have been met (authority to act in public emergencies such as natural disaster) in the absence of effective government, the second hurdle (finding deprivation of constitutional rights) would arguably still have presented problems. Although Katrina-like situations are now clearly contemplated in statute, the President must still find an associated deprivation of constitutional rights. No President since 1963 (public school desegregation) has been willing to make such a finding.

Unity of Effort

As stated earlier, the federal government's ability to respond to an emergency is constrained by the constitutional provisions which reserve police power to the states. The states have authority to call forth militias (the National Guard) to suppress insurrections, quell civil disturbances or respond to natural disasters and other catastrophic events. Given that each state sovereign has its own militia, it is impossible for Title 10 forces in the homeland to achieve unity of command with a state's militia. However, unity of effort is a goal that can be achieved through improved communication and coordination. The "Forces for Unified Commands" memorandum²⁹ envisions the establishment of a "coordinating authority" between Title 10 forces and non-federalized National Guard forces so that this unity of effort may be achieved. This authority is not command authority or authority to compel agreement, but rather authority delegated to a commander for coordinating specific functions and activities involving two or more forces. It is an authority to require consultation. This type of coordination would give SECDEF insight into how Title 32 funds are spent and give NORTHCOM and the National Guard situational awareness of each other's missions, locations, platforms, capabilities and rules for the use of force, promoting unity of effort among all forces. This coordination could be a condition precedent to SECDEF approval of Title 32 funding.

Dual-Status Commander

Another way to achieve unity of effort is through the establishment of a dual-status commander, a command arrangement discussed, but not used, during the 2005 hurricane season. There are two types of dual-status commanders. One involves providing a Title 10 officer a commission in a state National Guard thereby allowing him or her to exercise command and control over federal status (Title 10) forces and state status (Title 32/SAD) National Guard forces. The other involves placing a National Guard officer on Title 10 orders, while allowing that officer to retain his or her state authority, thereby enabling unity of command of both federal and state status forces.

32 US Code 315 authorizes the detail of regular members of the Army and Air Force to duty with a state National Guard by the Secretary of the Army or Secretary of the Air Force. With permission of the President, it allows an Army or Air Force officer to accept a commission in the National Guard if such is offered by the governor of the respective state. This authority has been used to authorize Title 10 officers to exercise command and control over National Guard units.

32 US Code 325 authorizes a National Guard officer familiar with the state and local area of operations to command in both a federal and state status. This authority was used in the 2004 G8 Summit, the 2004 Democratic and Republican national

conventions and Operation Winter Freeze, a five-month NORTHCOM mission in late 2004 and early 2005, which occurred on the northeast border of the United States. This is also the command arrangement that will be used for the Ground Based Midcourse Missile Defense units of the Colorado and Alaska National Guards.

Both options provide unity of effort, rather than unity of command, allowing both federal and state military forces to enhance their situational awareness.

There is no formal approval process for either situation. It usually begins with informal coordination between the state and NORTHCOM. Typically, action officers at NORTHCOM and the National Guard discuss various courses of action with a recommendation for the use of a dual-status commander. Then the state National Guard staff and NORTHCOM staff determine whether to seek approval from their respective chains of command. In all four 2004 events in which dual-status National Guard officer arrangements were approved, the governor sent an approval package, including a signed Memorandum of Agreement, to the President and/or SECDEF for signature (for certain events, the President has delegated approval to SECDEF).

The dual-status commander arrangement does not simultaneously authorize the use of Title 32 funding³⁰ for National Guard forces for operational missions. Title 32 funding approval is a separate process. Moreover, this arrangement does not “dual status” the forces or staff, whether federal or state status, commanded by the dual-status commander. The dual-status commander has two reporting chains and must consider the implications of the different rules and restrictions for each force under his or her command. It is likewise important that staff members, whether Title 10 or National Guard, understand their separate roles and missions.

DoD as Lead Federal Agency

Could DoD ever be tasked by the President to be the lead federal agency in a catastrophic event? Clearly, the Homeland Security Act of 2002³¹ confers statutory responsibility for federal response to catastrophic incidents to the Department of Homeland Security (DHS). One could argue that DoD could lead a component of the federal response as long as DHS maintained overall responsibility for the response as a whole. One could also conceive of a situation in which an incident is of such magnitude as to jeopardize national security, such that the President, under his Article II authority, could place DoD in the lead.

Conceptually, there is a critical void in the immediate aftermath of a major disaster (for discussion purposes, the first 48–72 hours after a disaster). Conceivably, local responders are incapacitated or busy attending to their own families; state assistance is forthcoming, but will take time to assemble sufficient National Guard forces and other responders into effective units; the governor has not yet requested

federal assistance or, if requested, it will take a short period of time for the National Response Plan to gear up and provide that assistance. In the meantime, American lives are at risk. DoD has the capability to respond quickly with well-trained units in constant communications unaffected by the disaster, and to sustain itself indefinitely. The overarching question is whether DoD has legal authority to fill that early and critical void.

Immediate Response Authority

There are situations that allow DoD to respond without prior approval from the chain of command. When imminently serious conditions resulting from any civil emergency or attack exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD components are authorized to take necessary and immediate action to respond to requests of domestic civil authorities in order “to save lives, prevent human suffering or mitigate great property damage.” Such actions are generally referred to as “immediate response.”³²

Ordinarily, assistance to civilian authorities is provided on a cost reimbursement basis. However, it should not be delayed or denied because of the inability or unwillingness of the requester to make a commitment to reimburse DoD. Additionally, those providing immediate response are required to notify the National Military Command Center (NMCC), through the chain of command, as soon as practical of the request for assistance, the nature of the response and any other relevant information related to assistance provided.

Generally, notice should reach the NMCC within hours of the decision to provide assistance. Immediate response has generally been contemplated as assistance provided in response to a natural disaster or other catastrophic incident. The assistance provided is in support of local officials and at their request. This response is generally limited in terms of time and geographic proximity of the commander and/or the requested capability to the incident.

Incident Awareness and Assessment

One of the most sensitive issues in the homeland is the use of intelligence assets during domestic operations. Consider the ramifications of flying a U-2 reconnaissance plane over the Gulf Coast during hurricane disaster relief operations. Beyond perceptions, one must consider if there is authority to use intelligence capabilities for non-intelligence missions (such as search and rescue and damage assessment) following a natural disaster. “Incident Awareness and Assessment” (IAA) is the term used to describe the use of intelligence assets, specifically intelligence, surveillance and reconnaissance (ISR) assets, in support of disaster relief operations.

Foreign intelligence (FI) and counterintelligence (CI) are the only authorized “intelligence activities” of the DoD intelligence community and must be conducted consistent with DoD Directive 5240.1 and DoD 5240.1-R.³³ In essence, this means that whenever DoD conducts an “intelligence activity,” there must be a foreign nexus, as required by the definitions of foreign intelligence and counterintelligence. DoD intelligence community officials have opined that SECDEF may approve use of DoD intelligence component capabilities for missions “other than intelligence activities” because the SECDEF has inherent authority to use any assets or personnel within the DoD to complete a DoD mission. In those instances, the mission must be a valid DoD mission, and SECDEF must approve both the mission and specific use of the DoD intelligence component capabilities.

Essentially, in order to use DoD intelligence component capabilities (personnel, units, planning, collection, analysis, production) for non-intelligence activities, there must be a Request for Forces (RFF) submitted through the command to the Joint Staff for review and approval by SECDEF. The request must identify the mission and specify the DoD intelligence component capability requested. The resulting execute order will be approved by SECDEF and specify what DoD intelligence component capabilities may be used and any operational parameters or limitations on the use of that capability.

These procedures give SECDEF the flexibility to use DoD assets for dual missions. For example, during a hurricane disaster support mission, the DoD intelligence components could be conducting intelligence activities (FI and CI) under existing authorities. Additionally, DoD intelligence component capabilities could be used for a non-intelligence mission by doing planning, tasking, analysis and production in support of search and rescue (SAR) and damage assessment. The second mission could involve a Request for Assistance (RFA) from a primary federal agency to DoD. In this situation, SECDEF approval would authorize the use of intelligence assets for non-intelligence purposes. Mission direction would be coordinated with the primary federal agency. Additionally, the RFA process is a “fee for service” operation. The primary federal agency would agree to pay for the cost of the IAA employment.

Leaders, at all levels, frequently seek to build situational awareness. Building situational awareness requires data to be collected by a combination of satellite, airborne, and ground sensors. The key is to create a means to bring all of this disparate data together into one coherent picture for decisionmakers and planners. The amount and type of data required differs depending on whether the leader is making strategic, operational or first responder decisions. The requirement for

situational awareness must be evaluated carefully, so that IAA assets are efficiently and effectively used.

Sensitive Information

The use of information about US persons and non-DoD persons and organizations is restricted depending on the mission of the DoD component involved. During disaster relief operations, force protection is always a concern when sending troops into a joint operating area. While this is true whether operating overseas or in the homeland, the rules in the homeland are more restrictive. Sensitive information falls into two major categories. The first category deals with information on US persons subject to intelligence oversight (IO) rules. The rules for this category of information apply only to DoD intelligence components.³⁴ The second category deals with information concerning the activities of persons and organizations not affiliated with DoD. The rules for this category apply to everyone except DoD intelligence components. The policy set forth in a 1980 directive, DoD Directive 5200.27, applies.³⁵

The general rule for this second category is that collecting, reporting, processing or storing information concerning individuals or organizations not affiliated with DoD is not permitted. This includes non-DoD persons/organizations within the 50 states, the District of Columbia, Puerto Rico, US territories and non-DoD affiliated US citizens anywhere in the world. There are exceptions to the general rule. Information may be gathered if it is essential to the accomplishment of the following defense missions:

- Protection of DoD functions and property. This exception encompasses threats to DoD military and civilian personnel and defense activities, installations and property. Only the following activities justify acquisition of non-DoD persons/organizations information:

- Subversion of loyalty, discipline or morale of DoD military or civilian personnel by encouraging violations of law, disobedience of orders or disruption of military activities;
- Theft of arms, ammunition or equipment; or destruction or sabotage of DoD facilities, equipment or records;
- Unauthorized demonstrations on DoD active or reserve installations;
- Direct threats to DoD military/civilian personnel in connection with their duties or to other persons authorized protection by DoD resources;
- Activities endangering facilities that have classified defense contracts or that have been officially designated as “key defense facilities”; and

- Crimes for which DoD has responsibility for investigating or prosecuting.
- Personnel security. Investigations regarding clearances for members of DoD and DoD applicants and persons needing access to classified information.
- Operations related to civil disturbances. If specifically authorized by SECDEF and there is a distinct threat of civil disturbance exceeding the law enforcement capability of state and local authorities.

Information collected under DoD Directive 5200.27 authority must be destroyed within 90 days unless retention is otherwise authorized. The dilemma is drawing the line between information needed for force protection purposes and information that is more appropriately handled by local law enforcement.

International Assistance

The United States has extensive experience providing assistance to other nations in the wake of disasters, but there is little recent precedent for the United States to receive international assistance following a homeland disaster. During Hurricane Katrina, many foreign countries offered assistance. For example, Canada sent ground troops, Mexico sent a mobile kitchen to provide food, and Germany and Denmark offered water pumps. Federal regulations, however, hindered the provision of the assistance in some cases. US Department of Agriculture regulations prevented the use of food from foreign nations whose health regulations did not meet US standards. In addition, the process to accept these “gifts” of assistance often meant assistance did not come as quickly as it was needed. In the case of foreign troops on the ground assisting in relief efforts, issues regarding the rules under which they would operate arose. Examples include rules for the use of force and medical credentials. The United States clearly has to resolve these issues as the paradigm of international assistance has changed.

Conclusion

As new hurricane seasons approach, NORTHCOM will continue to grapple with these legal issues and others that arise from various manmade and natural disaster relief situations. While homeland defense is NORTHCOM’s number one responsibility, the mission to support civil authorities is very important, and often at the forefront of NORTHCOM’s daily activities. NORTHCOM is called upon on a regular basis to assist other federal agencies in responding to natural and man-made disasters at the direction of the President or the Secretary of Defense. Because DoD support is often unique, NORTHCOM will continue to coordinate with federal,

state and local authorities to provide assistance, as directed, whenever and wherever it is needed.

Notes

1. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 US Code sec. 5121-5206 (2000).

2. “Major disaster” is defined as any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought) or, regardless of cause, any fire, flood or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments and disaster relief organizations in alleviating the damage, loss, hardship or suffering caused thereby. 42 US Code sec. 5122(2) (2000).

3. 42 US Code sec. 5170 (2000).

4. “Emergency” is defined as any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States. 42 US Code sec. 5122(1) (2000). Such response should not be confused with Emergency Response authority discussed in DoD Directive 3025.12, *infra* note 32.

5. 42 US Code sec. 5170 (2000).

6. 42 US Code sec. 5170b(c) (2000).

7. 42 US Code sec. 5191(b) (2000).

8. 42 US Code sec. 5170, 5191 (2000).

9. 44 Code of Federal Regulations sec. 206.44 (2005).

10. 44 Code of Federal Regulations sec. 206.35 (2005).

11. 46 Code of Federal Regulations sec. 206.63 (2005).

12. 46 Code of Federal Regulations sec. 206.66 (2005).

13. 42 US Code sec. 5170b(c)(1) (2000); 44 Code of Federal Regulations sec. 206.34 (2005).

14. 42 US Code sec. 5170b(c)(6)(B) (2000).

15. See US Code sec. 5170b(a)(3) (2000), which addresses “work and services to save lives and protect property.”

16. “The President may exercise any authority vested in him by section 5192 of this title [emergency declaration] or section 5193 of this title [amount of assistance] with respect to an emergency when he determines an emergency exists for which the primary responsibility for the response rests with the United States because the emergency involves a subject area for which, under the Constitution or the laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable. The President’s determination may be made without regard to subsection (a) of this section [i.e., a request for assistance from the Governor].” 42 US Code sec. 5191(b) (2000).

17. *Id.*

18. Notice of Presidential Declaration of a Major Disaster for the State of Oklahoma (FEMA-1048-DR), 60 Federal Register 21819-02 (1995).

19. Press Release, White House, Homeland Security Presidential Directive/HSPD-5 (Feb. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html>.

20. The National Response Plan of May 25, 2006 establishes a comprehensive all-hazards approach to enhance the ability of the United States to manage domestic incidents. It forms the basis of how the federal government coordinates with state, local and tribal governments and the private sector during incidents. The NRP is available at http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf.

21. Department of Defense, DoD Directive 3025.15, Military Assistance to Civil Authorities para 4.2 (1997), *available at* http://west.dtic.mil/whs/directives/corres/pdf/d302515_021897/d302515p.pdf.

22. 18 US Code sec. 1385 (2000).

23. The PCA does not apply to the Coast Guard. *Jackson v. Alaska*, 572 P.2d 87 (Alaska 1977). This is most clear in terms of the Coast Guard's Title 14 (Armed Forces) operations. PCA limitations are also inapplicable to the Coast Guard's Title 10 (Coast Guard) authority because the PCA, on its face, does not reference or limit the Coast Guard. Additionally, the PCA makes an explicit exception "in cases and under circumstances expressly authorized by . . . Act of Congress." Congress has expressly given the Coast Guard certain federal law enforcement duties by statute, e.g., 14 US Code sec. 2 and 89 (2000). While a DoD directive places PCA-like restrictions on the Navy and Marine Corps, the Coast Guard is not subject to this regulation. Department of Defense, DoD Directive 5525.5, DoD Cooperation with Civilian Law Enforcement Officials (1986), *available at* http://www.fas.org/irp/doddir/dod/d5525_5.pdf. The Coast Guard would only be subject to DoD and Department of the Navy policy limitations if made "a service in the Navy" by Presidential order or in a declaration of war by Congress. 14 US Code sec. 3 (2000).

24. 10 US Code sec. 331-333 (2000).

25. John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law No. 109-364, sec. 1075 (2006).

26. 10 US Code sec. 331 (2000).

27. 10 US Code sec. 332 (2000).

28. 10 US Code sec. 333 (2000), *amended by* John Warner National Defense Authorization Act for Fiscal Year 2007, *supra* note 25.

29. The "Forces for Unified Commands" is a memorandum in which the Secretary of Defense documents his direction for the assignment of forces to combatant commands and to US Element North American Aerospace Defense Command.

30. When performing duty pursuant to Title 32, US Code, a National Guard member is under the command and control of the state but paid with federal funds.

31. Homeland Security Act of 2002, Public Law No. 107-296, sec. 101 (b)(1)(D), 116 Statutes at Large 2142 (2002).

32. *See* Department of Defense, DoD Directive 3025.1, Military Support to Civil Authorities para. 4.5 (1993), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d30251_011593/d30251p.pdf; Department of Defense, DoD Directive 3025.15, Military Assistance to Civil Authorities para. 4.7.1 (1997), *available at* http://west.dtic.mil/whs/directives/corres/pdf/d302515_021897/d302515p.pdf; and Memorandum from the Deputy Secretary of Defense, Reporting "Immediate Response" Requests from Civil Authorities (Apr. 25, 2005).

33. Department of Defense, DoD Directive 5240.1, DoD Intelligence Activities (1988), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d52401_042588/d52401p.pdf, contains guidance for DoD intelligence components for the collection, retention and dissemination of information concerning US persons. Department of Defense, DoD 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons

(1982), *available at* http://www.dtic.mil/whs/directives/corres/pdf/52401r_1282/p52401r.pdf, contains detailed procedures to enable DoD intelligence components to carry out their assigned functions while ensuring their activities that affect US individuals are carried out in a manner that protects the constitutional rights and privacy of such persons.

34. Executive Order No. 12,333, 46 Federal Register 59,941 (Dec. 4, 1981); DoD Directive 5240.1, *supra* note 33; and DoD 5240.1-R, *supra* note 33, IO rules apply.

35. By directive, DoD establishes policy, limitations, procedures and operational guidance pertaining to the collecting, processing, storing and disseminating of information concerning persons and organizations not affiliated with DoD. It is the non-intelligence component equivalent of intelligence oversight rules. Department of Defense, DoD Directive 5200.27, Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense (1980), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d520027_010780/d520027p.pdf.

XIX

The Law of International Disaster Response: Overview and Ramifications for Military Actors

David Fisher*

As military lawyers are well aware, the international legal framework for the protection and assistance of civilians in conflict situations is well developed and deeply integrated into the ways lawyers and laypeople think and talk about war. The Geneva Conventions of 1949, the cornerstone of international humanitarian law (IHL), have now achieved universal adhesion;¹ over seventy nations have formed national commissions on IHL;² and IHL is being studied and written about in universities, military academies and other forums around the world. In contrast, the law of international disaster response, referred to in recent years as “International Disaster Response Laws, Rules and Principles” or “IDRL,” has been described as “neglected”³ and “far from complete,”⁴ with no centralized regime equivalent to the Geneva Conventions, few academic resources dedicated to the issue and, until recently, little attention from the international disaster relief community.

* Senior Legal Research Officer for the International Federation of Red Cross and Red Crescent Societies’ program on International Disaster Response Laws, Rules and Principles. The views and opinions expressed in this paper are those of the author and do not necessarily represent those of the International Federation.

Yet, over the last thirty-five years, there have been over fourteen thousand non-conflict disasters worldwide, resulting in more than 2.3 million deaths and affecting an astonishing 5.8 billion persons.⁵ In the overwhelming majority of these disasters, the governments, civil society and communities of the affected States have borne the brunt of relief and recovery themselves. However, international response activities have also necessarily been frequent⁶ and are increasing in proportion to the growing number and severity of disasters in recent years.⁷ Moreover, international disaster operations can sometimes be just as legally challenging as conflict relief, commonly involving barriers to the entry and effective use of relief personnel, goods, equipment and transport vehicles, as well as regulatory dilemmas for affected States—particularly in light of the growing number and diversity of international disaster responders.

For their part, military actors have long been engaged in disaster relief,⁸ but their involvement at the international level also appears to be on the rise. This increased engagement has led to a greater concern among military lawyers about the legal pitfalls involved,⁹ as well as concerns in the humanitarian community about the consequences of the “militarization” of international disaster assistance.

This paper will sketch the history and broad outlines of the current international legal framework for transborder disaster relief and recovery¹⁰ and discuss some of the most common legal problems that arise in international operations. It will then look—from a civilian’s perspective—at some of the ramifications for military actors. It will conclude with some thoughts on where the international community might choose to go from here.

Historical Background

While there are early precedents for international relief in peacetime, it was not until the mid-nineteenth century that momentum slowly began to build toward international systems to address national calamities.¹¹ For example, in 1851, France convened the first of a series of international sanitary conferences to negotiate agreements to combat the cross-border spread of diseases.¹² In 1869, a resolution of the second International Conference of the Red Cross affirmed the role of national Red Cross societies in providing relief “in case of public calamity which, like war, demands immediate and organized assistance.”¹³ In the late nineteenth and early twentieth centuries, multilateral telegraph and telecommunications treaties were adopted with specific provisions about emergency communications,¹⁴ and maritime agreements were reached codifying customary norms on rescue and assistance to vessels in distress.¹⁵

It was under the auspices of the League of Nations that the first serious attempt was made to create a comprehensive approach to international disaster relief. In 1927, a conference of forty-three States adopted the Convention and Statutes Establishing an International Relief Union (IRU).¹⁶ The Convention stipulated that the IRU should serve as a centralized operational agency, funneling international funds and support in disaster settings, coordinating other actors and promoting study and research on disaster management.¹⁷ It entered into force in 1932 and eventually attracted thirty member States. However, it was never able to effectively carry out its mission, due mainly to the crippling lack of funds incident to its inability to command regular contributions from member States.¹⁸ It intervened in two disasters and sponsored several scientific studies, but by the late 1930s, the IRU had already effectively ceased to function, though it was not officially terminated until 1967.¹⁹

After the failure of the IRU, international law on disaster relief developed in a fragmented and mostly unplanned manner, and institutional mandates were shared among a number of actors. In the 1950s, several States, notably the United States, began concluding bilateral treaties regulating the delivery of relief goods.²⁰ A second and third wave of bilateral treaties, mainly concerned with mutual assistance, were agreed upon in the 1970s and the 1990s respectively, mainly in Europe.²¹ Moreover, a number of multilateral treaties in other sectors of the law (such as customs harmonization,²² marine and air transport²³ and environmental protection²⁴) began to include provisions relevant to international disaster response, and recent decades have seen an upsurge in disaster-focused instruments (both “hard” and “soft”), particularly at the regional level.

A second attempt to develop a comprehensive treaty on disaster relief was made in 1984, when the United Nations Disaster Response Office (UNDRO), the forerunner to the Office for the Coordination of Humanitarian Affairs (OCHA), developed a “Draft Convention on Expediting the Delivery of Emergency Assistance” and presented it to the Economic and Social Council (ECOSOC).²⁵ The Draft Convention sought to set out basic rules for the entry and operation of international disaster relief from States and humanitarian organizations, including with regard to visas, customs clearance, transport rules, communications and liability. ECOSOC referred the text to the UN’s Second Committee,²⁶ which, despite expressions of support from several States,²⁷ took no official action on it, and the convention was never adopted.

The Current International Legal Framework

As a result of the foregoing, the current international legal and institutional framework for IDRL is dispersed, with gaps of scope, geographic coverage and precision. Still, there are a number of instruments that are worth highlighting—both for their potential uses and for their weaknesses.

Global Treaties

One of the most successful disaster law instruments in terms of ratification is the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency of 1986 (hereinafter Nuclear Accident Convention).²⁸ Adopted in the immediate wake of the Chernobyl accident, the Nuclear Accident Convention has garnered ninety-six State parties.²⁹ It lays out basic rules for the initiation, coordination and operation of international assistance operations in case of nuclear or radiological events, touching on the transit of equipment and personnel, privileges and immunities, and costs. However, as its name indicates, it is relevant only to nuclear and radiological emergencies—among the least frequent of the various types of major disasters.³⁰ Moreover, by its terms, it applies only to States, the International Atomic Energy Agency (IAEA) and other “inter-governmental organizations,” despite the essential role that the Red Cross/Red Crescent Movement, non-governmental organizations (NGOs) and other non-State actors have played in the recovery from the Chernobyl disaster.³¹

In contrast, the two global customs treaties with specific provisions on disaster response both apply to “relief consignments” regardless of their source. They are thus relevant to the full range of international relief actors. Specifically, Annexes B.3 and J.5 of the Convention on Simplification and Harmonization of Customs Procedures (“Kyoto Convention”) as amended in 1999³² call on States to exempt “relief consignments” from many normal customs processes, duties and restrictions. Similarly, Annex B.9 of the Convention on Temporary Admission (“Istanbul Convention”) of 1990³³ provides for exemptions from customs duties for certain types of equipment intended for re-export after a disaster relief operation. However, their membership is quite small,³⁴ and, in particular, includes only a handful of the most disaster-prone States.³⁵

Another recent convention that applies to the full range of international disaster responders is the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998.³⁹ The Tampere Convention calls for the elimination or reduction of regulatory barriers to the importation and operation of telecommunications equipment and personnel for disaster response purposes. It is the only instrument of its kind that extends

privileges and immunities, equivalent to those granted to the United Nations, to NGO personnel (though only those directly connected to relief telecommunications).⁴⁰

The Tampere Convention entered into force on January 8, 2005, and its first test came in Sri Lanka (which had ratified it in 1999) with regard to the response to the December 26, 2004 tsunami. Unfortunately, it appears that its provisions were invoked neither by the government nor by international relief providers, although some of them encountered problems with regard to the import and use of telecommunications equipment.⁴¹ On the other hand, some practitioners have reported success in referring to the treaty, even with regard to operations in States not party to it, as evidence of an international consensus on the need to facilitate the use of telecommunications in relief.⁴² Still, like the customs conventions, membership in the Tampere Convention remains limited⁴³ and currently includes only four of the twenty-five most disaster-prone States.⁴⁴

In 2000, the International Civil Defence Organization drafted a Framework Convention on Civil Defence Assistance³⁶ to improve mutual assistance between civil defense organizations in international disaster response operations. The Framework Convention sets out mechanisms for the offer and acceptance of assistance, regulations for how such assistance should be carried out, provisions for the reduction of administrative and customs barriers and “necessary” privileges and immunities for responders, and commitments to facilitate transit of civil defense units. It also calls on parties to supplement its provisions with more detailed agreements to carry out its spirit.³⁷ Though it has twenty-six signatories, to date only thirteen States have ratified or acceded to it, including no Western States.³⁸

A further IDRL convention with limited membership (twenty-two parties, including twenty-one States and the European Community⁴⁵) is the Food Aid Convention.⁴⁶ Originally adopted in 1967, it has gone through several revisions, the most recent of which was in 1999. It sets out annual quotas of certain types of food aid⁴⁷ to be provided by each member (whether bilaterally or through NGOs or “multilateral channels”) to certain recipient States, covering both emergency and non-emergency situations. It also sets out a number of guidelines as to the type and manner in which food aid should be delivered, including adherence to “basic humanitarian principles,” international quality standards and local dietary habits, and attention to the particular needs of women and children and other vulnerable groups, as well as potential harmful effects on local harvests and markets.

Critics have charged that the Food Aid Convention fails to effectively stabilize food aid because quotas have been set very low (substantially below the total amount of food aid given by most members) and have been repeatedly renegotiated downward in periods of tight supplies and that little effort is made to monitor

the quality requirements.⁴⁸ The convention is currently set to expire on June 30, 2007, if it is not extended or renegotiated.⁴⁹

Limited membership is unlikely to be a problem for the revised International Health Regulations (IHR) adopted by the World Health Assembly in 2005 and scheduled to enter into force in 2007,⁵⁰ inasmuch as the constitution of the assembly provides that all instruments adopted by that body will be binding on all member States unless they explicitly “opt out.”⁵¹ The revised IHR were prompted by communications failures in the SARS outbreak of 2003 and has been described as a radical development in international health law.⁵² It expands the scope of its predecessor instrument (which only applied to three types of disease) by obligating State parties to report on all diseases that might constitute a transborder public health threat and by greatly expanding the authority of the World Health Organization (WHO) to act upon information of outbreaks. Significantly, this includes formalizing WHO’s authority to receive and act upon reports originating from non-governmental actors.⁵³ Beyond this preventive aspect, the IHR’s provisions requiring national public health restrictions on import of goods to be kept to a reasonable minimum in line with the potential threat might also be of use in a disaster response setting in which goods and personnel must quickly cross borders.

Regional Law

Each of the major regions has also adopted at least some law on disaster response, though there is great variation in its scope. As in other areas of international law, Europe boasts the most elaborate framework of agreements. These include, among others, the Fourth Lomé Convention of 1989,⁵⁴ which sets out guidelines for assistance by Europe to African, Caribbean and Pacific States; the Council of Europe—Open Partial Agreement (EUR-OPA) Major Hazards Agreement of 1987, which created a framework of regular high-level meetings to improve cooperation in disaster response and prevention;⁵⁵ the European Community Civil Protection Mechanism, first adopted in 2001, which helps to coordinate the extraterritorial work of civil protection offices;⁵⁶ the Convention on the Transboundary Effects of Industrial Accidents of 1992, one of the most important treaties on man-made disasters;⁵⁷ subregional instruments such as the Agreement between Denmark, Finland, Norway and Sweden on Cooperation across State Frontiers to Prevent or Limit Damage to Persons or Property or to the Environment in the Case of Accidents of 1989;⁵⁸ and the Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters of 1998 (hereinafter BSEC Agreement).⁵⁹

In the Americas, the Inter-American Convention to Facilitate Disaster Assistance was adopted in 1991⁶⁰ with a number of provisions designed to lower bureaucratic and other barriers to easy entry of foreign disaster assistance; however, it was only ratified by three States.⁶¹ Greater success was seen with the agreements creating subregional inter-governmental mechanisms for disaster response, including the Coordination Centre for Natural Disaster Prevention in Central America (CEPREDENAC),⁶² the Andean Committee for the Prevention and Response to Disasters (CAPRADE),⁶³ and the Caribbean Disaster Emergency Response Agency (CDERA).⁶⁴

In Africa, there has been little systematic lawmaking at the regional level on disaster response.⁶⁵ One exception is the Inter-Governmental Authority on Development (IGAD),⁶⁶ originally created with the primary purpose of building cooperation to address issues of drought and desertification. Moreover, in recent years, proposals have been discussed to adopt a disaster-specific instrument in the Southern African Development Community (SADC).⁶⁷

The most recent regional IDRL treaty was adopted in Asia in the wake of the 2004 tsunami. The Association of Southeast Asian Nations' (ASEAN) South Asian Association for Regional Cooperation Agreement on Disaster Management and Emergency Response of 2005 (not yet in force) (hereinafter ASEAN Agreement)⁶⁸ is remarkable for its broad scope—covering disaster risk reduction, relief and recovery and addressing all types of international disaster responders—as well as for its attention to some of the key problem areas, including visas, customs, transport and coordination issues in international operations. It will also create a dedicated “Asian Coordinating Centre for Humanitarian Assistance” with broad responsibilities to share information and assist in coordinating disaster assistance to member States both in the region and from international actors.

Bilateral Treaties and Agreements

The overwhelming bulk of existing international IDRL instruments are bilateral agreements between States and between States and international humanitarian organizations. There are well over one hundred bilateral treaties, most of them in Europe.⁶⁹ In general, they tend to cover issues of initiation of assistance, entry of personnel and goods, command and control of response teams, assignment of costs (generally to the receiving State), and guarantees against liability (always in favor of the responding State). Bilateral agreements with humanitarian organizations (mostly with international organizations, such as UN agencies, but also, increasingly, with major international NGOs) tend to set out the parameters of the organization's long-term activities in the nation as well as any applicable legal privileges.

Soft Law, Guidelines and Models

Beyond the “hard law” described above, there are an important number of relevant “soft law” instruments, such as resolutions or declarations of international bodies, as well as guidelines, models and codes developed mainly by experts or by the humanitarian community itself. Some of these, though admirably crafted, have been mainly forgotten. However, others have formed the basis for systems of international cooperation in disaster response that are certainly as important as any currently based on “hard law.”

Among the best-known resolutions are UN General Assembly Resolution 46/182 of 1991, which sets out general parameters for UN humanitarian assistance and the role of the Office for the Coordination of Humanitarian Affairs (OCHA), and 57/150 of 2002, which called on States to facilitate the entry and operation of international urban search and rescue teams in disaster settings and, in turn, called on those teams to comply with the quality standards set out in guidelines developed and facilitated by an international advisory group. The Hyogo Framework for Action, adopted by an international conference in 2005⁷⁰ and later affirmed by a resolution of the UN General Assembly, also includes institutional and regional preparedness for relief among its primary priorities,⁷¹ but this element has not been emphasized in the follow-up activities of States and the United Nations.

An important resolution that is less well known today is the Measures to Expedite International Relief, adopted by both the International Conference of the Red Cross and the UN General Assembly in 1977.⁷² This resolution discussed in some detail some of the most practical types of legal facilities governments should ensure for international disaster assistance providers. Unfortunately, it has rarely been evoked in modern operations.

A number of “off-the-shelf” models and guidelines have also been produced with the intention to speed agreements between affected States and international actors wishing to provide assistance. For military actors, the Oslo Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief, as updated in 2006 and discussed in greater detail below, is the most important example. Further guidance can be found in the UNITAR Model Rules for Disaster Relief of 1996 and the Max Planck Institution Draft International Guidelines for Humanitarian Assistance of 1991.⁷³ However, few of these latter documents are well known by disaster response professionals.

The most important instruments relating to the responsibilities of disaster assistance providers are the Code of Conduct of the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief of 1994 and the Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response as updated in 2004, both developed by humanitarian

organizations to serve as minimum standards of behavior and performance in disaster relief.⁷⁴ Both have been well disseminated, and most established humanitarian organizations have indicated that they use them. However, the absence of any formal mechanism for monitoring and verification of these claims renders an assessment of their impact difficult.

Institutional Mandates and Privileges

In addition to these disaster-specific instruments, the international community has provided a number of institutions with formal mandates to engage in humanitarian relief, including in disaster situations. The intricacies of this institutional structure have been described elsewhere⁷⁵ and will not be explored here, except to note that they include both global and regional institutions. At the global level, these include UN agencies and organs and the Red Cross/Red Crescent Movement among others. At the regional level, organizations such as ASEAN, the South Asian Association for Regional Cooperation (SAARC), IGAD, the European Community Civil Protection Mechanism, CEPREDENAC and CDERA have also been accorded important roles with regard to the coordination of international disaster response.

To a varying extent, these entities have also been provided specific facilities pertinent to their operations. For example, the Convention on Privileges and Immunities of the United Nations of 1946⁷⁶ and the Convention on Privileges and Immunities of the Specialized Agencies of 1947⁷⁷ provide the basis for the recognition of domestic legal personality of UN entities, as well as important exemptions to normal rules concerning visas, customs, judicial oversight and other regulatory systems. Similar privileges and immunities have been accorded to the international components of the Red Cross/Red Crescent Movement in bilateral agreements with States.⁷⁸

Importantly, the NGO sector lacks a formal international legal mandate for its activities, although its effectiveness and prominence is large and growing, as discussed further below.

Summary

In short, there are a number of international instruments relevant to disaster response but their proliferation has not resulted in a coherent legal system. Likewise, it has been argued with regard to institutional mandates that “there is no international relief system *per se*, as the diverse set of actors displays little structural interdependence [and lacks] a common boundary, other than the fact that each component may on occasion contribute to the relief process.”⁷⁹ OCHA is currently leading a process of reform to address structural coordination and cooperation

problems among UN agencies and their humanitarian partners;⁸⁰ however, the international humanitarian community has yet to pay significant attention to the harmonization of the legal framework.

Legal Problems in International Disaster Response

The absence of a comprehensive system of international law on any particular topic is not necessarily a reason for concern. The question is whether there are problems of a legal or regulatory nature that have been left unaddressed. Insofar as international disaster response is concerned, the answer to this question is that there are indeed a number of such problems that arise consistently in major international operations and constitute a substantial drag on their speed, efficiency and effectiveness. In significant part, these problems can be attributed to the absence of previously established laws, regulations and institutional structures focused on international assistance at the national level. Thus, for example, the Pakistani government has acknowledged that “Pakistan suffered from the lack of a pre-existing National Disaster Management Authority” and applicable legal structure when the earthquake struck in October 2005.⁸¹ Likewise, the United States Government Accountability Office issued a report in the wake of Hurricane Katrina concluding that “FEMA and other agencies did not have policies and procedures in place to ensure the proper acceptance and distribution of in-kind assistance donated by foreign countries and militaries.”⁸²

Typical problems in international response can be roughly divided into two main categories: legal obstacles to the entry and operation of international relief; and failures of monitoring, coordination and regulation of international aid. Problems of both categories usually coincide in the same disaster operations. This section will provide a few recent examples.

Obstacles to Entry and Operations

The initiation of international disaster assistance can be difficult for political, rather than legal, reasons, as some governments have been reluctant to request or accept needed aid for fear of appearing weak or dependent, to avoid publicity for a disaster, and/or to demonstrate their disapproval of the offering party.⁸³ Governments are likewise sometimes unwilling to provide basic information about a disaster for similar reasons, leaving potential responders at a loss as to how best to react.⁸⁴ On the other hand, it has also been the case that foreign donors have pressured governments to accept assistance they did not really need. For example, it was reported that a large number of foreign governments insisted on sending field hospitals and medical personnel to Indonesia in the wake of the 2004 tsunami, despite

pleas from the Indonesian government and the World Health Organization that they were not required.⁸⁵

Frequently, however, the problem is more technical. While many States have some provision in their law as to which department (frequently the office of the prime minister or president) may initiate a request for international disaster assistance, the lack of standardized systems for making the determination that outside help is needed has led to long delays,⁸⁶ and communication about specific needs is often imperfect. Thus, for example, after Hurricane Katrina struck in August 2005, it was reported that a Swedish government plane loaded with water purification gear, blankets and telecommunications equipment was kept on a runway for eleven days awaiting clearance to fly to the United States.⁸⁷ By the time permission was granted and the plane was able to depart, none of the supplies it carried were still needed.

Sometimes, entry visas for international disaster response personnel have been either delayed or refused by the governments of affected States, even after international assistance has been requested. For example, several States in Central America have refused visas to relief personnel from other parts of Latin America, in part due to heightened concerns about illegal immigration.⁸⁸ In most cases, however, response personnel have been able to enter affected States on tourist or short-term visas, but problems have emerged later in the operation. For instance, international personnel responding to the 2004 tsunami in Thailand and Indonesia were required to frequently exit and re-enter those nations in order to renew short-term visas, incurring both significant expense and disruption to their operations.⁸⁹

Regulations on the passage of relief transport vehicles and customs delays on incoming goods and equipment are other critical barriers in many operations.⁹⁰ For example, one year after the tsunami struck Indonesia, over four hundred containers of relief goods were still awaiting customs clearance in Jakarta and Medan.⁹¹ In the meantime, many of the perishable items rotted, medicines expired, and some items that were needed at the onset of the response operation (such as tents and surgical equipment) were no longer required.⁹² After Hurricane Katrina struck the United States, the British Ministry of Defence sent five hundred thousand "Meals Ready to Eat" (MREs) by civil aircraft.⁹³ However, after their arrival in Arkansas, it was determined that they contained meat products prohibited by US health regulations, and they were therefore stored in a warehouse at significant expense for a number of months pending distribution to other countries.⁹⁴

Delays can also arise before goods even reach the borders of the affected nation. For example, in August 2006, after strong winds in Swaziland left thirteen thousand persons homeless and exposed to ongoing heavy rains, the IFRC's regional delegation in Harare, Zimbabwe sent a shipment of tarpaulins and tents.⁹⁵ However, the

shipment was delayed at the border with South Africa for five days before they could proceed to the destination nation, due to problems with customs. Analogously, overflight of transit States can occasionally raise difficulties, as when Pakistan reportedly refused to allow flights of Indian aid to Afghanistan to cross its airspace.⁹⁶

Sometimes customs delays cause headaches over and above the obvious issue of forestalling the intended use of the affected goods and equipment. For instance, after the 1999 earthquake in Turkey, it was reported that relief goods delayed in customs beyond the statutory storage deadline had been summarily nationalized.⁹⁷ Somewhat analogously, in Indonesia, storage fees for tsunami relief cargo awaiting customs clearance mounted so high due to delays that they sometimes exceeded the value of the relief consignments themselves.⁹⁸ Charges of this type, as well as customs duties and other types of taxes, tolls and fees on disaster operations, have dramatically increased their costs and lowered their effectiveness. In Sri Lanka, for example, Oxfam was required to pay a £550,000 customs duty in June 2005 to import twenty-five four-wheel vehicles for its tsunami rehabilitation operations.⁹⁹

Another common issue that some international disaster responders encounter is obtaining recognition of their domestic legal status in the affected State. In Thailand, for example, international NGOs found the local registration process so difficult to navigate that nearly none were successful in doing so.¹⁰⁰ As a result, some had difficulty opening bank accounts, obtaining work permits, hiring local staff and applying for tax exemptions.¹⁰¹

Similarly, obtaining recognition of the foreign qualifications of medical personnel has frequently proven difficult. In Nepal, for instance, it was reported that

[w]hilst some organisations were aware of the process of obtaining permission from the Medical Council of Nepal, the process was a lengthy one and not easily adapted to emergency situations. Other organisations were not aware of the necessary processes, and in at least one instance a prominent medical NGO was asked to cease activities altogether for failing to comply with the regulations.¹⁰²

Furthermore, foreign actors lacking diplomatic or inter-governmental privileges and immunities find themselves exposed to the risk of civil and/or criminal liability in unfamiliar legal systems. On the civil side, local employee recruitment and termination reportedly provide particularly fertile ground for litigation in disaster response operations as domestic labor laws generally fail to accommodate the speedy and short-term staffing requirements of international disaster response operations.¹⁰³ Medical malpractice has also been identified as an area of particular concern.¹⁰⁴ Exposure to criminal investigation was raised as an issue by a number

of disaster responders to the 1999 earthquake in Turkey, and one that substantially affected their operations.¹⁰⁵

Problems of Quality and Coordination

Closely related to entry and operation barriers are issues of quality and adequate coordination of international relief and recovery assistance. In the absence of effective international mechanisms of control, affected State governments have often struggled to address the flood of external actors responding to those major disasters with the highest media attention.¹⁰⁶

Perhaps the most important quality issue is the arrival of vast quantities of unwanted, unneeded and inappropriate relief goods, which embroil customs offices, fill airports and warehouses, and block the flow of needed goods. For example, in each of the largest disaster operations of 2005 (e.g., the tsunami in Indonesia, Thailand and India; the earthquake in Pakistan; and Hurricane Katrina in the United States), heaps of used clothing appeared. In tropical Sri Lanka, these included winter coats and hats, dress shoes, pyjama tops (without bottoms) and even “thong underwear.”¹⁰⁷ In Muzaffarabad, Pakistan, piles of useless warm-weather clothes were burned for warmth.¹⁰⁸ As noted by the Tsunami Evaluation Coalition (TEC) report—a major multiagency study of the international response to the 2004 tsunami—“assistance” in the form of used clothes, expired or poorly labeled medicines, inappropriate food (such as canned pork sent to Muslim Indonesia), and other assorted eccentric items is “not just worthless to the recipients; it has a negative value. It occupies storage and transport space at the very time when this is needed for real aid. It then requires special handling to dispose of—all an additional burden on a response.”¹⁰⁹

In addition to increased shipments of goods, major disasters are attracting larger numbers of international actors on the ground. The growth in the numbers of NGOs becoming involved in disaster response has been particularly impressive. For example, after the December 2004 tsunami, it was reported that there were two hundred NGOs working in Aceh.¹¹⁰ In India, nearly three hundred NGOs were reported to be working in Nagapattinam District alone.¹¹¹ While particularly pronounced after the tsunami, this trend can be seen in other highly televised disasters as well.¹¹² In addition, more UN agencies, Red Cross and Red Crescent societies, private companies and unaffiliated individuals are travelling to disaster sites seeking to help.¹¹³

Among these new actors, many are inexperienced and some act without sufficient understanding of, or regard for, international standards of quality in disaster response. As noted by the TEC report, “[t]here is general agreement that there were far too many agencies present in Indonesia and Sri Lanka. The low entry barrier to

the system permits the entry of inexperienced and incompetent actors,” and while “[e]xperienced agencies are not immune from low quality work . . . the risks are higher with inexperienced actors.”¹¹⁴ Thus, for example, an unidentified NGO was found to have vaccinated children in a village near Banda Aceh, Indonesia after the tsunami, leaving no records and no way to determine who had been vaccinated and who had not.¹¹⁵

Many “traditional” humanitarians in tsunami-affected nations were also shocked to find themselves working alongside “Scientologist trauma care” workers who purported to heal tsunami victims by influencing energy waves with their hands.¹¹⁶ To their dismay, and as noted in one media report from India, “[i]n the eyes of the local public, [Scientology’s] operations are indistinguishable from those of UNICEF and CARE and the Red Cross.”¹¹⁷ Other purportedly “humanitarian” organizations were accused of proselytizing in several tsunami-affected nations, and even conditioning aid on religious conversion.¹¹⁸

Probably the most common complaints in disaster operations revolve around problems of coordination and sharing of information between the various actors. The proliferation of international responders has done nothing to improve these problems. In the tsunami operations, for example, “[a]chieving adequate representation and consensus among even the larger, mature INGOs and Red Cross agencies was not easy; but with such a large number of smaller agencies also on the ground in the first six months, coherent joint planning and implementation was unlikely.”¹¹⁹ Aceh was dubbed an “information black hole” where overfunded humanitarian agencies competed for beneficiaries, overserving some communities and ignoring the needs of others.¹²⁰

International coordination mechanisms remain largely voluntary—even among UN agencies—and have struggled to prevent irregular coverage of disaster-affected persons.¹²¹ For their part, national institutional frameworks for monitoring and coordination of international relief were overwhelmed in both Indonesia and Sri Lanka, leading to multiple structural changes over the course of the relief and recovery operations in both nations.¹²²

However, even with a more modest international intervention, governments of the affected States have experienced significant difficulty in the absence of strong regulatory and institutional mechanisms. For example, after Tropical Storm Stan caused massive flooding in Guatemala in October 2005, it was widely recognized that the national disaster management network “CONRED” and its secretariat were unable to track and coordinate the activities of the several dozen foreign organizations and States that arrived to provide assistance.¹²³ In contrast, in Fiji, after a detailed legal and regulatory structure was put in place for international relief, few coordination problems were noted in recent disaster operations.¹²⁴

Ramifications for Military Actors

How does all of this relate to military actors? First, as noted above, militaries in a number of nations are becoming increasingly keen on international disaster relief, both on a bilateral and multilateral basis. As noted by the United Nations, “Member States, even those who do not give a primary role to their military forces in domestic response, are now using their military capacity for relief operations on a global basis.”¹²⁵ For example, in 1992, Japan amended its law on international disaster relief to provide a specific role for its military forces, which have been active in operations ever since.¹²⁶ Similarly, in 1996, the Canadian military created a permanent disaster response team to be used for foreign disaster operations.¹²⁷ The US military, long mandated to participate in international disaster relief, has also increased its emphasis on “humanitarian” activities in recent years.¹²⁸ For instance, its contribution after the 2004 tsunami was its biggest operation in the Asia-Pacific region since the Vietnam War.¹²⁹ The Americans, Japanese and Canadians joined no less than thirty-two other national militaries that responded to the tsunami.¹³⁰

Similarly, in 1998 NATO created its Euro-Atlantic Disaster Response Coordination Centre (EADRCC) and has also embraced a “growing humanitarian role” in disaster response operations, including for Hurricane Katrina in the United States and the October 2005 earthquake in Pakistan.¹³¹ NATO has even gone so far as to negotiate its own memorandum of understanding with member States for the facilitation of civilian relief personnel and materiel.¹³² Proposals have recently been raised for regional military cooperation mechanisms in Central America and Asia to facilitate military involvement in disaster relief.¹³³

Second, military responders experience many of the same legal issues and concerns as civilian actors in disaster response operations, as well as issues uniquely related to the commonly strict domestic regulation of their mandates and roles in international operations and the special sovereignty and security concerns that the presence of foreign troops raise for affected States.¹³⁴ As noted in one summary of the “lessons learned” from NATO’s intervention in Pakistan, “[t]he importance of working with host governments must not be underestimated. Many issues must be resolved before operations forces arrive, including terms of entry, force protection, legal status, communication channels, liaison arrangements, contracting arrangements, use of land for basing and translators.”¹³⁵

Third, military responders face a similarly patchy normative framework. Few existing disaster-related treaties make specific reference to military involvement, though many of their more general provisions (for example, on facilitating entry of goods and personnel) should also apply to military responders. Those that do have specific reference, such as the ASEAN Agreement,¹³⁶ the BSEC Agreement,¹³⁷ and

the Agreement of 1974 between Sweden and Norway concerning the Improvement of Rescue Services in Frontier Areas¹³⁸ commonly seek to address issues of the command relationship between the assisting and affected State forces, identification of foreign forces (e.g., uniforms) and the carriage of arms. When they are in place, bilateral or regional (e.g., NATO) status of forces agreements or MOUs address a number of the issues that might arise for military actors in disaster operations.¹³⁹ However, they are limited in number and difficult to negotiate at the outset of a disaster.

The pre-eminent “soft law” instrument on military involvement in disaster relief is the Oslo Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief. First developed by the United Nations and endorsed by an international conference in Oslo in 1994, the Oslo Guidelines were updated and “relaunched” at a new conference in November 2006.¹⁴⁰ Particularly as updated this year, the guidelines stress that military relief assets should be considered a last resort when no civilian alternatives are available.¹⁴¹ They also encourage (though do not require) military and civil defense forces to act “under UN control” in disaster operations.¹⁴² They set out minimum facilities that should be offered by affected States, in areas such as legal status, customs, visas, overflight and security, and also set out coordination structures and basic principles to which military and civil defense operations should adhere. They also include a model agreement addressing these sorts of issues as an annex.

The emphasis in the Oslo Guidelines on civilian control reflects the current ambiguity in the humanitarian community about the increasing role of the military in disaster operations. On the one hand, the capacities and achievements of military actors in international disaster relief—particularly in the areas of transport and logistics—are undeniable. For instance, the international military contributions to the tsunami relief have been described as pivotal to the success in avoiding the feared “second tsunami” of starvation and disease.¹⁴³ On the other hand, military assistance is expensive—sometimes many times more costly than when the same services are provided by civilian sources¹⁴⁴—and its identification and integration with humanitarian activities raises thorny policy issues. These are particularly acute in armed conflict settings, when military attempts to “win hearts and minds” can confuse the distinction between military and humanitarian agencies, rendering the latter more liable to attack.¹⁴⁵ However, even in disaster settings, an overly close identification has been seen as dangerous for public perceptions of the neutrality of humanitarian actors. Moreover, there is concern that precedent set for close integration between military and humanitarian actors in a disaster setting may be difficult to alter in a later situation of conflict.¹⁴⁶ Thus, the Oslo Guidelines call for “direct assistance” to be provided as much as possible by humanitarian

actors, with militaries instead providing “indirect assistance” (such as transport and logistical aid) and “infrastructure support” (such as rebuilding roads and generating power).¹⁴⁷

Conclusion and Prospects for the Future

It seems plain that some improvements in the way that international disaster assistance is generally facilitated and regulated would be desirable. While every disaster setting is in some ways unique, and the very nature of the enterprise (particularly in sudden-onset disasters) lends itself to some level of improvisation, the fact that a consistent set of legal problems tends to crop up in disaster settings around the world suggests that better regulation may have a role in improving the outcome of disaster relief operations.

At the national level, a workable balance still remains to be struck in most States between sufficient openness to allow quick entry and easy operation of international disaster assistance and sufficient control to ensure the quality and overall effectiveness of a relief and recovery effort. International actors (both civilian and military) and affected State governments have suffered alike from this imbalance, to the detriment of efficient support to affected persons. To address this, more governments need to thoroughly analyze such issues and adopt appropriate legislation and regulations prior to being struck by a disaster. Some—particularly those struck by major disasters in 2005¹⁴⁸—are beginning to do so, and others might be led to it through their activities pursuant to the Hyogo Framework.

At the international level, the dissemination and use of existing instruments could be much improved.¹⁴⁹ Even if this occurs, however, there are significant gaps in the current framework when measured against the common problem areas. Nevertheless, one commentator, noting the spotty historical development of international norms in this area, ongoing State concerns about sovereignty, and the recently enhanced emphasis of the international community on disaster risk reduction has concluded that “the direct role of international law with respect to the policy on natural disasters will not grow significantly.”¹⁵⁰ On the other hand, as described above, recent years have seen significant “hard” and “soft” law developments, including the ASEAN Agreement, the International Health Regulations, the entry into force of the Tampere Convention, the NATO MOU and the revision and reaffirmation of the Oslo Guidelines. In fact, there seems to be no shortage of will to address some of the relevant issues, but rather a continuing lack of coherence and comprehensiveness among current initiatives.

Looking to the future, the International Conference of the Red Cross and Red Crescent, a forum including all State parties to the Geneva Conventions as well as

the various components of the Red Cross/Red Crescent Movement, is scheduled to take up a set of recommendations on the issues described in this paper in November 2007—particularly with regard to what States might be encouraged to include in domestic law and policy. The consultation process leading to that conference, including regional forums organized with governmental and inter-governmental partners around the globe, has already begun generating greater publicity and attention to these issues.¹⁵¹ Moreover, the International Law Commission (a UN body whose object is the “promotion of the progressive development of international law and its codification”¹⁵²) recently decided to place the issue of the “protection of persons in natural disasters” on its long-term program of work.¹⁵³ There is thus reason to hope that there will be greater progress on these issues in the near future.

Notes

1. See Press Release, Jean-Philippe Lavoyer, Head of Legal Division, International Committee of the Red Cross, A milestone for international humanitarian law (Sept. 22, 2006), *available at* <http://www.icrc.org>.

2. International Committee of the Red Cross, Annual Report 2005, at 26, *available at* <http://www.icrc.org>.

3. INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, WORLD DISASTERS REPORT 2000, at 157 (2000).

4. Bosko Jakovljevic, *Some Reflections on International Disaster Relief Law*, 16 INTERNATIONAL CIVIL DEFENCE JOURNAL 32, 34 (2006).

5. Source: Emergency Disasters Data Base (EM-DAT): The Office of US Foreign Disaster Assistance/Centre for Research on the Epidemiology of Disasters (OFDA/CRED) International Disaster Database, <http://www.em-dat.net> [hereinafter CRED Database] (last visited Oct. 21, 2006).

6. While figures for interventions by the international humanitarian sector as a whole are difficult to locate, the International Federation of Red Cross and Red Crescent Societies alone has recorded nearly two thousand international relief operations in 153 nations since its founding in 1919. See International Federation of Red Cross and Red Crescent Societies Powerpoint Presentation, To improve the lives of vulnerable people by mobilizing the power of humanity (July 2006) (on file with author).

7. See, e.g., INTER-AGENCY SECRETARIAT OF THE INTERNATIONAL STRATEGY FOR DISASTER REDUCTION (UN/ISDR), LIVING WITH RISK: A GLOBAL REVIEW OF DISASTER REDUCTION INITIATIVES 45 (2004) (noting the increasing incidence of disasters).

8. See, e.g., Fred Cuny, Uses of the Military in Humanitarian Relief, Presentation to the International Peace Academy, Niinsalo, Finland (Nov. 1989), *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/cuny/laptop/humanrelief.html>.

9. For example, the United States Defense Threat Reduction Agency is currently developing a “legal deskbook” that will describe the “U.S. and international laws, regulations and policies that apply when a foreign government requests U.S. assistance after a chemical, biological, radiological or nuclear, and/or high-yield explosives (CBRNE) event[.]” United States Defense Threat Reduction Agency, Foreign Consequence Management Legal Deskbook Workshop I Report, Vicenza, Italy (Sept. 27–28, 2005) (on file with author). See also United States Defense

Threat Reduction Agency, Foreign Consequence Management Legal Deskbook Workshop II Report, McLean, Virginia, (Feb. 2, 2006) (on file with author).

10. For a more exhaustive discussion of the existing instruments, see Victoria Bannon, *Strengthening Disaster Response Laws, Rules and Principles: Overview of the Current System and a New Way Forward*, in *TSUNAMI AND DISASTER MANAGEMENT: LAW AND GOVERNANCE* (C. Raj Kumar & D.K. Srivastava eds., 2006).

11. See PETER MACALISTER-SMITH, *INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION* 17 (1985); YVES BEIGBEDER, *THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS* 8–9 (1991).

12. See Obijiofor Aginam, *International Law and Communicable Diseases*, 80 *BULLETIN OF THE WORLD HEALTH ORGANIZATION* 946, 947 (2002).

13. See MACALISTER-SMITH, *supra* note 11, at 17–18. This role was later solidified by the Constitution of the League of Red Cross Societies (now known as the International Federation of Red Cross and Red Crescent Societies (IFRC), formed in 1919, and in Article 25 of the Covenant of the League of Nations, which called on member States to “encourage and promote the establishment and cooperation of duly authorized national Red Cross organizations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.”

14. See International Federation of Red Cross and Red Crescent Societies, Background Information Sheet: International Regulation of Telecommunications in Disaster Relief (Apr. 25, 2006), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

15. See, e.g., Convention for the Unification of Certain Rules of Law in Regard to Collisions Between Vessels, Sept. 23, 1910, 1930 Austl. T.S. No. 14, available at <http://www.admiraltylawguide.com/conven/collisions1910.html>, and the Convention for the Unification of Certain Rules With Respect to Assistance and Salvage at Sea, Sept. 23 1910, 1936 Austl. T.S. No. 9, available at <http://www.admiraltylawguide.com/conven/salvage1910.html>.

16. See Peter Macalister-Smith, *Reflections on the Convention Establishing an International Relief Union of July 12, 1927*, 54 *LEGAL HISTORY REVIEW* 363, 364 (1986).

17. Convention and Statute Establishing an International Relief Union, July 12, 1927, L.N.T.S. 3115 (1932) [hereinafter IRU Convention].

18. See Macalister-Smith, *supra* note 16, at 370.

19. *Id.* at 370–72.

20. See Horst Fischer, *International disaster response law treaties: trends, patterns and lacunae*, in *INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES* 24, 25 (Victoria Bannon ed., 2003).

21. *Id.*

22. See International Convention on the Simplification and Harmonization of Customs Procedures, May 18, 1973, 950 U.N.T.S. 269, T.I.A.S. 6633 (1973), and its 1999 Protocol of Amendment, *infra* note 32.

23. See, e.g., Convention on Facilitation of International Maritime Traffic, annex 1, secs. 5.11–5.12, Apr. 9, 1965, 591 U.N.T.S. 265; 4 *INTERNATIONAL LEGAL MATERIALS* 502; Convention on International Civil Aviation, annex 9, sec. 8.8, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, reprinted in *INTERNATIONAL CIVIL AVIATION ORGANIZATION, INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES: FACILITATION – ANNEX 9 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION* (12th ed. 2005).

24. See, e.g., Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances, art. 7, Sept. 13, 1984, Official Journal of the European Communities, No. L 188/9 (July 16, 1984).

25. See U.N. Doc. No. A/39/267/Add.2 – E/1984/96/Add. 2 (June 18, 1984), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

26. See Decision 1984/175, reprinted in Resolutions and Decisions of the Economic and Social Council: Second Regular Session of 1984, Geneva 4–27 July 1983, Supplement No. 1A (United Nations, 1984) (taking note of the draft convention and referring it to the General Assembly).

27. See, e.g., Summary Record of the 32nd Meeting, UNGAOR, 39th Sess., UN Doc. No. A/C.2/39/Sr.32 (Nov. 6, 1984) at 10 (Ecuador); Summary Record of the 35th Meeting, UNGAOR 39th Sess., U.N. Doc. No. A/C.2/39/SR.35 (Nov. 7, 1984) at 3 (Indonesia); Summary Record of the 37th Meeting, UNGAOR 39th Sess., U.N. Doc. No. A/C.2/39/SR.37 (Nov. 12, 1984) at 12 (Zambia). Several States publicly called for more time for discussion on the Draft Convention. See, e.g., Summary Record of the 37th Meeting, UNGAOR 39th Sess., U.N. Doc. No. A/C.2/39/SR.37 (Nov. 12, 1984) at 12 (Philippines); Summary Record of the 34th Meeting, UNGAOR 39th Sess., U.N. Doc. No. A/C.2/39/SR.34 (Nov. 12, 1984) at 7 (Nordic States).

28. 1439 U.N.T.S. 275 (1986).

29. See http://www.iaea.org/Publications/Documents/Conventions/cacnare_status.pdf (last visited Nov. 1, 2006).

30. The CRED EM-DAT database includes radiological emergencies and explosions as sub-categories along with many other types of man-made disaster under the heading “Industrial Accidents.” See EM-DAT Glossary, <http://www.em-dat.net/glossary.htm#I> (last visited Nov. 1, 2006). According to the database, industrial accidents as a whole represented 7.1% of all non-conflict disasters from 1970–2006, amounting to less than half of the number of wind storms (16.1%) and of floods (19.4%). See CRED Database, *supra* note 5.

31. An online database on the response to the Chernobyl disaster maintained by the Swiss Agency for Development and Cooperation lists over one hundred (mostly international) non-State organizations still actively involved in the response, over twenty years after the accident. See <http://www.chernobylinfo.int> (last visited Nov. 1, 2006).

32. Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures of 18 May 1973, June 26, 1999, S. TREATY DOC. No. 108-6 available at <http://www.ifrc.org/what/disasters/idrl/publication.asp> (hereinafter Kyoto Convention). This amended version has now superseded the old one for 50 of its original 63 State parties. The original convention is expected to eventually be entirely defunct as additional State parties “switch over.” See Press Release, World Customs Organization, Revised Kyoto Convention Continues to Grow (Aug. 3, 2006), available at <http://www.wcoomd.org/ie/En/en.html>. Of the two annexes of the original version of the Kyoto Convention directly relevant to disaster relief, only one (Annex F.5) is currently (and probably only temporarily) still in effect during this transition period, and only between two parties, Kenya and Israel. See World Customs Organization, Position as Regards Ratifications and Accessions (at July 1, 2006): International Convention on the Simplification and Harmonization of Customs Procedures, Doc. No. PG0138E1a, July 25, 2006, available at <http://www.wcoomd.org>. Neither of the original annexes ever garnered more than a dozen State adherents. See World Customs Organization, Position as Regards Ratifications and Accessions (at June 30, 2004): International Convention on the Simplification and Harmonization of Customs Procedures.

33. Convention on Temporary Admission, June 26, 1990, 1993 Austl. T.S. No. 43, available at <http://www.wcoomd.org> [hereinafter Istanbul Convention].

34. There are currently eight State parties to Specific Annex B.3, seven parties to Specific Annex J.5 of the Kyoto Convention and thirty-seven parties to Annex B.9 of the Istanbul Convention. See World Customs Organization, Position as Regards Ratifications and Accessions (as of July 1, 2006): International Convention on the Simplification and Harmonization of Customs Procedures (as amended), Doc. No. PG0137E1a; and Position as Regards Ratifications and Accessions (as of July 1, 2006): Convention on Temporary Admission (as amended), Doc. No. PG0139E1a; both available at <http://www.wcoomd.org/ie/en/Conventions/conventions.html>.

35. Of the twenty-five States that have experienced the greatest number of non-conflict disasters over the last fourteen years (per the CRED Database, *supra* note 5), three have signed Kyoto Convention Specific Annex B.3, two have signed its Specific Annex J.5, and four have signed Annex B.9 of the Istanbul Convention. Other customs instruments, although lacking specific reference to disaster situations, might also be helpful. These include the ATA Carnet for the Temporary Admission of Goods of 1963, available at <http://www.wcoomd.org>, which allows for passage without inspection of goods across the borders of transit States, and the Customs Convention on the Temporary Importation of Professional Equipment, June 8, 1961, 1968 Austl. T.S. No. 6, available at <http://www.austlii.edu.au>, which allows for duty-free importation of “any . . . equipment necessary for the exercise of the calling, trade or profession of a person visiting the territory of another country to perform a specific task.”

36. 2172 U.N.T.S. 231 (2000).

37. *Id.*, art. 4(b).

38. As of December 1, 2005. See International Civil Defence Organization, Framework Convention on Civil Defence Assistance, May 22, 2000, 2172 U.N.T.S. 38131, <http://www.icdo.org/pdf/org/act-coop-frame-signatures-en.pdf>.

39. Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, June 18, 1998, United Nations depositary notification C.N.608.1998.TREATIES-8 of 4 December 1998 (entered into force Jan. 8, 2005). The full text is available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

40. *Id.*, art. V.

41. See International Federation of Red Cross and Red Crescent Societies, *Legal issues from the international response to the tsunami in Sri Lanka: An International Disaster Response Laws, Rules and Principles (IDRL) Programme Case Study 16* (July 2006), available at <http://www.ifrc.org/docs/pubs/idrl/report-srilanka.pdf> [hereinafter Sri Lanka Case Study].

42. Field interviews by the author.

43. There are currently thirty-five parties to the convention. See United Nations Treaty Database, <http://untreaty.un.org> (last visited Oct. 31, 2006).

44. According to disaster data obtained from the CRED Database, *supra* note 5.

45. This information was obtained from the United Nations Treaty Service website, <http://untreaty.un.org/> (last visited Jan. 4, 2007). By its terms, ratification or accession to the treaty is limited to a prescribed list, or those approved by the Food Aid Committee. See Food Aid Convention, *infra* note 46, art. XXII.

46. The Food Aid Convention is one of two components of the International Grains Agreement of 1995, Apr. 13, 1999, 2073 U.N.T.S. 135, available at <http://www.igc.org.uk/en/downloads/brochure/iga1995.pdf>.

47. The “eligible products”—in other words, those that a member State can report toward its agreed annual quota—are grains, grain and rice products of primary or secondary processing, pulses, edible oil, root crops, skimmed milk powder, sugar, seed for eligible products and, to a limited extent, other products “which are a component of the traditional diet of vulnerable groups or . . . of supplementary feeding programs[.]” Food Aid Convention, *supra* note 46, at

art. III. The Convention does not limit contributions of other types of foods, but they cannot be counted toward the member's quota.

48. See H. Bruce Huff & Michelle Jimenez, *The Food Aid Convention: Past Performance and Future Role Within the Global Trade and Development Environment* 6–7, conference paper presented at the International Conference on Agricultural Policy Reform and the WTO: Where Are We Heading?, in Capri, Italy, June 23–26, 2003, available at <http://www.ecostat.unical.it/2003agtradeconf/Contributed%20papers/Huff%20and%20Jimenez.PDF>; Sophia Murphy & Kathy McAfee, *U.S. Food Aid: Time to Get It Right* 15 (Institute for Agriculture and Trade Policy, 2005), available at <http://www.tradeobservatory.org/library.cfm?refid=73512>.

49. At its December 2006 session, the Food Aid Committee reportedly also agreed “in principle” to extend the Convention for another year beyond the June 2007 deadline, subject to confirmation at its next meeting. However, it also agreed to consider amending the treaty at that meeting. See Press Release, IGC-FAC (Dec. 14, 2006), available at <http://www.igc.org.uk/downloads/pr/pr06071.pdf>.

50. World Health Assembly, Revision of the International Health Regulations, Doc. No. WHA58.3 (May 23, 2005) [hereinafter revised IHR]. In light of the alarming implications of the recent outbreak of avian influenza, the World Health Assembly adopted a resolution in May 2006 urging member States to voluntarily begin implementing pertinent provisions of the revised IHR immediately. See 59th World Health Assembly, Resolution EB117.R7, Agenda Item 11.1, WHO Doc. A59/87 (May 26, 2006), available at http://www.who.int/gb/e/e_eb117.html.

51. See Constitution of the World Health Organization art. 22, July 22, 1946, available at <http://www.yale.edu/lawweb/avalon/decade/decad051.htm>.

52. See Michael Baker & David Fidler, *Global Public Health Surveillance Under New International Health Regulations*, 12 EMERGING INFECTIOUS DISEASES 1058 (2006).

53. Unfortunately, the revised IHR does not directly provide for measures to protect or even maintain the confidentiality of these non-State whistleblowers. See David Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE JOURNAL OF INTERNATIONAL LAW 325, 375 (2005).

54. 1991 Official Journal of the European Communities, Legislation 229.

55. Also known as the “Open Partial Agreement on the Prevention of, Protection against and Organization of Relief in Major Natural and Technological Disasters,” established by Council of Europe Committee of Ministers Resolution 87(2) of March 20, 1987. The agreement is open to both European and non-European States and currently has twenty-five members. See http://www.coe.int/t/dg4/majorhazards/presentation/presentation_en.asp.

56. Council Decision 2001/792/EC, establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions of October 23, 2001, Euratom, Official Journal L 297/7, Nov. 15, 2001, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_297/l_29720011115en00070011.pdf.

57. Mar. 17, 1992, 2105 U.N.T.S. 460. See in particular Article 12 and Annex X.

58. Jan. 20, 1989, 1777 U.N.T.S. 249 (No. 31001).

59. Available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

60. Inter-American Convention to Facilitate Assistance in Cases of Disaster (1984), available at <http://www.oas.org/legal/intro.htm>.

61. They are Panama, Peru and Uruguay. See IDRL Document Information Sheet, available at http://www.ifrc.org/Docs/idrl/I128EN_I.pdf.

62. See Nuevo Convenio Constitutivo del Centro de Coordinación para la Prevención de los Desastres naturales en América Central (CEPREDENAC), Sept. 3, 2003, SICA Doc. No. STD/C/

071/03, available at <http://www.cepredenac.org>. CEPREDENAC was first formed on October 29, 1993. See CEPREDENAC: Antecedentes, <http://www.cepredenac.org/antecedentes.htm>.

63. Consejo Andino de Ministros de Relaciones Exteriores, Decisión 529, Creación del Comité Andino para la Prevención y Atención de Desastres (CAPRADE), July 7, 2002, available at <http://www.comunidadandina.org/normativa/dec/D529.htm>.

64. See Agreement Establishing the Caribbean Disaster Emergency Response Agency, Feb. 26, 1991, available at <http://www.caricom.org/jsp/community/agreement-cdera.htm>.

65. See Tracy-Lynn Field, *International Disaster Response Law in a Southern Africa Context*, in INTERNATIONAL DISASTER RESPONSE, *supra* note 20, at 83.

66. See Agreement Establishing the Inter-Governmental Authority on Development (IGAD), Mar. 21, 1996, Doc. No. IGAD/SUM-96/AGRE-Do, available at http://www.igad.org/about/agreement_establishing_igad.pdf. Although IGAD has extended its activities and is now mainly known for its conflict resolution initiatives, it is still active on issues of drought. See, e.g., IGAD Council of Ministers, Resolution on the Drought and Famine Situation in the IGAD Region, Mar. 18, 2006, available at <http://www.igad.org>.

67. See L. Amathila, Deputy Prime Minister of the Republic of Namibia, Statement at the Opening of the SADC Pre-Season Disaster Management Meeting, Windhoek, Namibia, Sept. 19–20, 2005, available at http://www.grnnet.gov.na/News/Archive/2005/september/week3/disaster_rpt.htm.

68. ASEAN Agreement on Disaster Management and Emergency Response (2005), available at <http://www.aseansec.org>.

69. See Horst Fischer, *supra* note 20, at 24. These treaties have been collected and are available on the IFRC's IDRL Database at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

70. See Report of the World Conference on Disaster Reduction, U.N. Doc. No. A/Conf.206/6 (Mar. 6, 2005), Resolution 2.

71. See *id.* at 17–18 (describing “Priority 5”).

72. See 23rd International Conference of the Red Cross (1977), res. VI; ECOSOC Res. 2012 (LXIII) (1977); and U.N. GAOR 32nd Sess., 98th plenary meeting, Doc. A/RES/32/56 (1977). The latter is available at <http://www.ifrc.org/what/disaster/idrl/publication.asp>.

73. All three instruments are available at <http://www.ifrc.org/what/disaster/idrl/publication.asp>.

74. Both documents are available at <http://www.ifrc.org/what/disaster/idrl/publication.asp>.

75. See, e.g., MACALISTER-SMITH, *supra* note 11.

76. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15.

77. Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.

78. See Elise Baudot-Quéguiner, *The Laws and Principles Governing Preparedness, Relief and Rehabilitation Operations: The Unique Case of the International Federation of Red Cross and Red Crescent Societies*, in INTERNATIONAL DISASTER RESPONSE LAWS, *supra* note 20, at 127, 131; Gabor Rona, *The ICRC's Status: In a Class of Its Own* (Feb. 17, 2004), <http://www.icrc.org/web/eng/siteeng0.nsf/html/5W9FJY>.

79. See BEIGBEDER, *supra* note 11, at 10 (citing Randolph Kent).

80. See Office for the Coordination of Humanitarian Affairs, *Appeal for Improving Humanitarian Response Capacity: Cluster 2006* (Mar. 29, 2006), available at http://www.who.int/hac/network/interagency/news/2006_Cluster_Appeal.pdf.

81. Farooq Ahmad Khan, Remarks at the ISDR Side Event to ECOSOC 2006: Panel discussion and briefing on progress of the implementation of the Hyogo Framework for Action 2005–

2015: Building Resilience of Nations and Communities to Disasters (July 19, 2006), available at <http://www.unisdr.org/eng/isdr-system/docs/ecosoc-19jul-Pakistan%20.ppt>.

82. United States Government Accountability Office, *Hurricane Katrina: Comprehensive Policies and Procedures are Needed to Ensure Appropriate Use and Accountability for International Assistance*, at i, Doc. No. GAO-06-460 (Apr. 2006), available at <http://www.gao.gov/new.items/d06460.pdf>.

83. See, e.g., Rohan Hardcastle & Adrian Chua, *Humanitarian assistance: towards a right of access to victims of natural disasters*, 325 INTERNATIONAL REVIEW OF THE RED CROSS 589 (1998), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JPJD> (providing examples).

84. See, e.g., Barbara Demick, *Aid Groups in Dark About North Korean Flood*, LOS ANGELES TIMES, Sept. 4, 2006, at A4 (reporting complaints from aid groups about the lack of information provided by the North Korean government about the effects of recent flooding).

85. See Matthew Moore & Lindsay Murdoch, *Water, Not Hospitals, Needed in Aceh*, SYDNEY MORNING HERALD (Jan. 10, 2005), available at <http://www.smh.com.au/news/Asia-Tsunami/Water-not-hospitals-needed-in-Aceh/2005/01/09/1105205983764.html>.

86. See, e.g., International Federation of the Red Cross and Red Crescent Societies, *IDRL Asia-Pacific Study, Fiji, Laws, Policies, Planning and Practices on International Disaster Response* 30 (July 2005), available at <http://www.ifrc.org/docs/pubs/idrl/idrl-fiji.pdf> [hereinafter *Fiji Case Study*]; Turkish Red Crescent Society, *International Disaster Response Law, 1999 Marmara Earthquake: Case Study* 38 (2006), available at <http://www.ifrc.org/Docs/pubs/idrl/report-turkey.pdf> [hereinafter *Turkey Case Study*].

87. See ANNE C. RICHARD, *ROLE REVERSAL: OFFERS OF HELP FROM OTHER COUNTRIES IN RESPONSE TO HURRICANE KATRINA* 16 (2006).

88. Based on interviews by the author with Red Cross actors in the region. For examples in other regions, see, e.g., *Fiji Case Study*, *supra* note 86, at 31 (noting delays with visas); *Turkey Case Study*, *supra* note 86, at 48 (same); *Sri Lanka Case Study*, *supra* note 41, at 14–15 (noting that the government of Sri Lanka delayed or refused visas for certain relief personnel—particularly finance staff—in order to induce responding agencies to hire local staff for those functions).

89. See International Federation of Red Cross and Red Crescent Societies, *Legal issues from the international response to the tsunami in Indonesia: An International Disaster Response Laws, Rules and Principles (IDRL) Programme Case Study* 14 (forthcoming 2007) [hereinafter *Indonesia Case Study*]; International Federation of the Red Cross and Red Crescent Societies, *Legal issues from the international response to the tsunami in Thailand: An International Disaster Response Laws, Rules and Principles (IDRL) Programme Case Study* 15 (July 2006) available at <http://www.ifrc.org/docs/pubs/idrl/report-thailand.pdf> [hereinafter *Thailand Case Study*].

90. As a 2003 case study compiling interviews from thirteen countries in South Asia, Southern Africa and Central America noted, “[t]he import of relief goods and equipment was an issue of great concern to the various international actors. In most countries, the imposition of heavy taxes or cumbersome bureaucratic procedures on the import of goods necessary for relief efforts presented a source of constant frustration for international assistance.” International Federation of Red Cross and Red Crescent Societies, *International Disaster Response Law Project: Report on findings from South Asia, Southern Africa and Central America* 14 (Mar. 2003) [hereinafter *Multi-country Case Study*].

91. See *Indonesia Case Study*, *supra* note 89, at 21 (citing *Help on the Way for Stuck Tsunami Aid*, JAKARTA POST, Jan. 14, 2006).

92. *Id.*

93. See RICHARD, *supra* note 87, at 18.

94. *Id.* at 18–19.

95. International Federation of Red Cross and Red Crescent Societies, Swaziland: Storm, DREF Bulletin No. MDRSZ001, Update No. 1 (Aug. 17, 2006), *available at* http://www.ifrc.org/cgi/pdf_appeals.pl?06/MDRSZ00101.pdf.

96. *Transit Denial by Pak Hampering Afghan Reconstruction*, ISLAMIC REPUBLIC NEWS AGENCY (Aug. 9, 2006), *available at* <http://www.irna.ir/en/news/view/menu-236/0608097142181634.htm>.

97. See Turkey Case Study, *supra* note 86.

98. See Indonesia Case Study, *supra* note 89, at 22.

99. See Sri Lanka Case Study, *supra* note 41, at 17.

100. See Thailand Case Study, *supra* note 89, at 14.

101. *Id.*

102. See International Federation of Red Cross and Red Crescent Societies, *IDRL Asia-Pacific Study: Nepal – Laws, Policies, Planning and Practices on International Disaster Response* 28 (July 2005), *available at* <http://www.ifrc.org/docs/pubs/idrl/idrl-nepal.pdf> [hereinafter Nepal Case Study].

103. Based on author's interviews of legal counsel of major international NGOs.

104. See, e.g., Ruth Blackham & Karin Margolius, *The Legal Standing of Disaster Relief Workers Abroad: An Australian Perspective*, 2 LEGAL MEDICINE JOURNAL No. 1, Abstract 6 (July 2005).

105. See Turkey Case Study, *supra* note 86, at 49 (noting that over a quarter of organizations surveyed on this question had been the object of a criminal investigation, which, for most of them, had seriously hindered their operations).

106. It must be noted, however, that many disasters provoke nowhere near the attention and assistance required from the international community. This issue of "forgotten emergencies" might also be seen as a result of the anarchic international assistance "system." They do not present a particular regulatory problem at the national level, however, and so are not discussed here in depth.

107. See Patrick Barta & Eric Bellman, *Sri Lanka is Grateful, but What to Do with the Ski Parkas?*, WALL STREET JOURNAL, Feb. 3, 2005, at A1.

108. See Aamer Ahmad Khan, *Resilience Among Ruins of Muzaffarabad*, BBC NEWS (Oct. 28, 2005), http://news.bbc.co.uk/2/hi/south_asia/4385234.stm.

109. John Telford & John Cosgrave, *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report* 52 (Tsunami Evaluation Coalition, 2006) [hereinafter TEC Report], *available at* <http://www.tsunami-evaluation.org/The+TEC+Synthesis+Report/Full+Report.htm>.

110. *Id.* at 55.

111. *Id.*

112. For instance, nearly one hundred NGOs responded to the 2001 earthquake in Gujarat, India and one hundred twenty responded to the 2003 earthquake in Bam, Iran. See Disasters Emergency Committee, *The Earthquake in Gujarat, India: Report of a monitoring visit for the DEC* para. 15 (Mar. 2001), *available at* <http://apps.odi.org.uk/erd/advsearch.aspx?CallNo=699,698,666,632,665,499,411,416,664,343,357,296,314,415,533,400,100,134,103,380>; International Federation of Red Cross and Red Crescent Societies and the Iranian Red Crescent Society, *Operations Review of the Red Cross Red Crescent Movement Response to the Earthquake in Bam, Iran* 12 n.19 (May 20, 2004), *available at* http://www.ifrc.org/cgi/pdf_evaluation.pl?eval04/Bam-operations-review.pdf.

113. See Arjun Katoch, *The Responders' Cauldron: The Uniqueness of International Disaster Response*, 59 JOURNAL OF INTERNATIONAL AFFAIRS 153, 164 (2006).

114. See TEC Report, *supra* note 109, at 107 & n.131.

115. INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, WORLD DISASTERS REPORT: FOCUS ON INFORMATION IN DISASTERS 93 (2005) [hereinafter WORLD DISASTER REPORT].

116. *Id.* See also Peter Goodman, *For Tsunami Survivors, a Touch of Scientology*, WASHINGTON POST, Jan. 28, 2005, at C01, available at <http://www.msnbc.msn.com/id/6878931/>.

117. *Id.*

118. See Australian Broadcasting Corporation: The World Today, Claims Tsunami Aid Used as Evangelical Opportunity (Dec. 19, 2005), <http://www.abc.net.au/worldtoday/content/2005/s1534097.htm>; Michael Gartland, *Christians Defy Law to Convert Muslims in Tsunami Aftermath*, Johns Hopkins University International Reporting Project (2005), available at http://www.pewfellowships.org/stories/indonesia/indonesia_christians.htm.

119. Jon Bennett et al., *Coordination of International Humanitarian Assistance in Tsunami-Affected Countries* 77 (Tsunami Evaluation Coalition, 2006), available at http://www.tsunami-evaluation.org/NR/rdonlyres/0E43484A-B991-4EF6-8230-BC3154812BC/0/coordination_final_report.pdf.

120. See WORLD DISASTER REPORT, *supra* note 115, at 89–92.

121. *Id.* See also Constanza Adinolfi et al., *Humanitarian Response Review* (Office for the Coordination of Humanitarian Assistance, 2005), available at <http://www.reliefweb.int/library/documents/2005/ocha-gen-02sep.pdf>.

122. See Sri Lanka Case Study, *supra* note 41, at 3–8; Indonesia Case Study, *supra* note 89, at 5–7.

123. Based on interviews performed by the author in Guatemala City in November 2006 in preparation of a case study due to be published in early 2007. For a list of foreign organizations that participated in the relief effort, see the dedicated website created for the disaster by UNDP: <http://www.pnudguatemala.org/stan>.

124. See Fiji Case Study, *supra* note 86, at 31.

125. Press Release, United Nations, UN Updates Guidelines for International Military Aid in Disaster Relief Operations (Nov. 27, 2006), available at <http://www.un.org/apps/news/story.asp?NewsID=20733&Cr=disaster&Cr1=relief>.

126. See Go Ito & Kazuyuki Sasaki, *The Self-Defense Forces Overseas: Japan's Lessons from the Indian Ocean Tsunami Assistance*, LIAISON, vol. 3, no. 3 (web version), http://www.coe-dmha.org/Liaison/Vol_3No_3/Dept18.htm.

127. See *Disaster Relief: Canada's Rapid-response Team*, CBC NEWS, Oct. 17, 2005, at <http://www.cbc.ca/news/background/cdnmilitary/dart.html>.

128. See George Topic, *A Long Tradition of Cooperation and Support*, E-JOURNAL USA, United States Department of State (Nov. 2004), <http://usinfo.state.gov/journals/itps/1104/ijpe/topic.htm>.

129. See TEC Report, *supra* note 109, at 60.

130. See Katoch, *supra* note 113, at 158.

131. See Maurits Jochems, *NATO's growing humanitarian role*, NATO REVIEW, Spring 2006, at 15, available at <http://www.nato.int/docu/review/2006/issue1/english/art4.html>. For a list of other operations in which NATO has participated, see NATO Civil Emergency Planning, *NATO's Role in Disaster Assistance* (2d ed. 2001), available at <http://www.nato.int/eadrcc/mcda-e.pdf>.

132. See Press Release 109 (2006), NATO, NATO Allies and Partners Agree a Memorandum of Understanding on Crises Assistance (Sept. 13, 2006), available at <http://nids.hq.nato.int/docu/pr/2006/p06-109e.htm>.

133. See Sam Logan, *Central America Talks Regional Military Force*, ISN Security Watch (Oct. 10, 2006), <http://www.isn.ethz.ch/news/sw/details.cfm?id=16771>; Dominique Loh, *FPDA Ministers*

Want to Set Up Disaster Relief Coordination Centre, Channelnewsasia.com, June 5, 2006, www.channelnewsasia.com/stories/singaporelocalnews/view/212051/1/.html.

134. For example, legal concerns regarding initiation of aid, entry of personnel, vehicles and goods, liability and coordination were prominently featured in the workshops the United States Department of Defense has organized on “Foreign Consequence Management.” See *supra* note 9.

135. Tyler Fitzgerald & Salvatore Moccia, *Lessons Learned from Pakistan: NATO Response Force Debuts, Sharpens its Focus*, DefenseNews.com, Dec. 5, 2005, <http://www.defensenews.com/story.php?F=1405428&C=commentary>.

136. See *supra* note 68.

137. See *supra* note 58.

138. Mar. 19, 1974, 1424 U.N.T.S. 307 (No. 24063), available at <http://www.ifrc.org/Docs/idrl/I98EN.pdf>.

139. See Role of the Southern European Task Force in FCM, Remarks of Mark Oswald, in Defense Threat Reduction Agency, Foreign Consequence Management Legal Deskbook Workshop I Report, Vicenza, Italy, 27–28 September 2005 (on file with author).

140. See *supra* note 125.

141. See Oslo Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief para. 5 (Rev. Nov. 2006), available at <http://ochaonline.un.org/DocView.asp?DocID=5247>.

142. *Id.* at para. 3.

143. See TEC Report, *supra* note 109, at 59.

144. See *id.* at 57; Jane Barry, *A Bridge Too Far: Aid Agencies and the Military in Humanitarian Response*, Humanitarian Practice Network Paper No. 37 (Jan. 2002), available at [http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5FKHH5/\\$FILE/odi-bridge-jan02.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5FKHH5/$FILE/odi-bridge-jan02.pdf?OpenElement) (providing multiple examples in the conflict context).

145. See Barry, *supra* note 144, at 11–12; Raj Rana, *Contemporary Challenges in the Civil-Military Relationship: Complementarity or Incompatibility?*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 565 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66DDF7/\\$File/irrc_855_Rana.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66DDF7/$File/irrc_855_Rana.pdf).

146. See Guidance Document on Relations between the Components of the Movement and Military Bodies, para. 6, adopted by Council of Delegates of the Red Cross and Red Crescent, res. 7, Nov. 18, 2005.

147. See Oslo Guidelines, *supra* note 141, para. 32. The Oslo Guidelines (para. 1) define “direct assistance” as “the face-to-face distribution of goods and services”; “indirect assistance” as “at least one step removed from the population and involv[ing] such activities as transporting relief goods and personnel”; and “infrastructure support” as “providing general services, such as road repair, airspace management and power generation that facilitate relief, but are not necessarily visible to or solely for the benefit of the affected population.”

148. These include Pakistan (see *supra* note 81) and Sri Lanka (see Sri Lanka Ministry of Disaster Management, *Towards a Safer Sri Lanka: A Roadmap for Disaster Risk Management* (Dec. 2005)), among others.

149. The IFRC’s IDRL Programme has been working toward this end through training, publications and the creation of a database of existing instruments, <http://www.ifrc.org/idrl>.

150. See David Fidler, *Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?*, 6 MELBOURNE JOURNAL OF INTERNATIONAL LAW 458, 473 (2005).

151. For a description of these forums and their results, see <http://www.ifrc.org/idrl>.

152. Statute of the International Law Commission (1947) art. 1, available at <http://www.un.org/law/ilc>.

153. See Report of the International Law Commission, 58th Sess. (May 1–June 9 and July 3–Aug. 11, 2006), U.N. Doc. No. A/61/10 (2006), at 464.

Contributors

Editor's Note: In order to most accurately portray the events of the conference, the biographical data in this appendix reflects the position in which the authors were serving at the time of the conference, as set forth in the conference brochures and materials.

Professor Craig H. Allen is Judson Falknor Professor of Law at the University of Washington, Seattle, Washington. He joined the University of Washington faculty in 1994, following his retirement from the US Coast Guard. He is a licensed master mariner, a Fellow in the Nautical Institute and a member of the Royal Institute of Navigation and the US Maritime Law Association. Professor Allen is on the board of editors of the *Ocean Development and International Law* journal and is the author of *Farwell's Rules of the Nautical Road*. Professor Allen served as the Charles H. Stockton Professor of International Law at the US Naval War College in the 2006–07 academic year.

Rear Admiral Jorge Balaesque, Chilean Navy (Ret.), teaches strategy and other military courses at Chile's Academia de Guerra Naval (Naval War College) in Valparaíso and is a fellow of the Chilean Maritime History Society. During his thirty-five-year naval career, he served as a submarine officer, attended the Academia de Guerra Naval (1983–84) and was the commander of the Second Naval Zone at Talcahuano.

Mr. John B. Bellinger III is the legal adviser to the secretary of state. He is the principal adviser on all domestic and international law matters to the Department of State, the Foreign Service and the diplomatic and consular posts abroad. He is also the principal adviser on legal matters relating to the conduct of foreign relations to other agencies and, through the secretary of state, to the president and the National Security Council. From February 2001 to January 2005, Mr. Bellinger served as senior associate counsel to the president and legal adviser to the National Security Council at the White House. He served as counsel for national security matters in the Criminal Division of the Department of Justice from 1997 to 2001. He served previously as counsel to the Senate Select Committee on Intelligence (1996), as general counsel to the Commission on the Roles and Capabilities of the US Intelligence Community (1995–96) and as special assistant to Director of Central Intelligence William Webster (1988–91). From 1991 to 1995, he practiced law with

Wilmer Cutler & Pickering in Washington, DC. Mr. Bellinger is a member of the Council on Foreign Relations and the American Council on Germany and a Fellow of the British-American Project.

Professor Gene E. Bigler is University Professor-Practitioner of International Relations and Diplomacy at the University of the Pacific, Stockton, California. Before joining the University of the Pacific he was director of the Office of Strategic and External Affairs, Bureau of Democracy, Human Rights and Labor in the US Department of State. He served previously as a counselor for public opinion and polling in the Coalition Provisional Authority in Baghdad; as special assistant in the Office of International Affairs, Commandant, US Coast Guard; in the US embassies in Panama, Peru and Italy; and in several postings in the US Information Agency and State Department on South American and Latin American public opinion and information matters. He has taught in a number of schools and programs, including Hendrix College in Conway, Arkansas, and in Venezuela and Ecuador. Professor Bigler is a frequent conference speaker and consultant, as well as the author, coauthor or a contributor to numerous agency reports, books, edited collections and journals.

Rear Admiral Michael A. Brown, US Navy, serves in the Office of the Chief of Naval Operations as director, Information Operations Division and deputy director of the Cryptology Division. During his first three years as a commissioned officer he served on board the *USS Vogelsang* and the *USS Connole*. He next attended the Naval Postgraduate School and following graduation he was assigned to the National Security Agency/Central Security Service in the Electronic Warfare and Technology Directorate.

In 1989, Rear Admiral Brown transferred to US Naval Security Group Activity, Edzell, Scotland, where he served as an operations watch officer, communications department head, and the Collection, Processing, and Reporting Division officer. Following that tour, he was assigned to Commander, Cruiser Destroyer Group Two in Charleston, South Carolina. His next assignment was at the Naval War College; he graduated in 1995. After graduation, he served as the executive officer, Naval Security Group Activity, Winter Harbor, Maine. In May 1998, Rear Admiral Brown was assigned as the branch chief of the Information Operations Policy Branch on the chief of naval operations staff. His follow-on assignment was as executive assistant to the commander of Naval Security Group and executive assistant to the special assistant to the chief of naval operations for information operations. Rear Admiral Brown then became the commanding officer, Naval Information Warfare Activity in Suitland, Maryland. He next became the deputy

commander/chief of staff, Naval Security Group Command where he was selected to the rank of rear admiral in 2005.

Lieutenant Colonel Evan Carlin, Australian Defence Force, is the command legal officer at Headquarters Joint Operations Command in Sydney, Australia. Lieutenant Colonel Carlin's previous positions include chief legal officer at the Deployable Joint Force Headquarters, staff officer to the judge advocate general of the Australian Defence Force and Australian exchange legal officer at Headquarters Land Command in the United Kingdom. While posted to the United Kingdom, Lieutenant Colonel Carlin was deployed to northern Macedonia as the legal adviser at the Kosovo Verification and Coordination Centre, a NATO headquarters established prior to the bombing campaign in Kosovo. On his return to Australia, he deployed to Baghdad as the legal adviser at the Australian National Headquarters in Camp Victory. In 2004 he deployed with a planning team to Fiji to conduct combined contingency planning for humanitarian assistance/disaster relief operations in the South Pacific. In January 2005 he deployed to northern Sumatra with the Australian task force in response to the tsunami that struck there on Boxing Day. Most recently he has been involved in advising on Australian operations in Iraq and East Timor.

Mr. Gus Coldebella is the deputy general counsel for the Department of Homeland Security. He works with the general counsel in managing the Office of the General Counsel and is responsible for advising the secretary and other senior leadership on legal issues arising throughout the Department of Homeland Security, as well as coordinating with legal officers at other executive branch agencies and at the White House on homeland security-related issues. Mr. Coldebella spearheaded the effort to respond to congressional and other related inquiries regarding Hurricane Katrina. Until September 2005, Mr. Coldebella was a partner at Goodwin Procter LLP in Boston. He also prosecuted crimes as a special assistant district attorney in Cambridge, Massachusetts.

Professor Yoram Dinstein is the Yanowicz Professor of Human Rights at Tel Aviv University (Israel) and a former president of the university. Professor Dinstein served two appointments (1999–2000, 2002–03) as the Charles H. Stockton Professor of International Law at the US Naval War College. He was also a Humboldt Fellow at the Max Planck Institute for Comparative Public Law and International Law at Heidelberg (Germany) in 2000–01. Professor Dinstein is a Member of the Institute of International Law and a member of the Executive Council of the American Society of International Law. He has written extensively on subjects relating to

international law, human rights and the law of armed conflict. He is the founder and editor of the *Israel Yearbook on Human Rights*. He is the author of *War, Aggression and Self-Defence*, now in its fourth edition. His latest book is *The Conduct of Hostilities under the Law of International Armed Conflict*.

Brigadier General Mari K. Eder, US Army, is the Army's deputy chief of public affairs. She has over twenty-nine years of Army service and has served as an Army public affairs officer at the installation, division, theater support command and unified command levels. She has served as an active and reserve officer and as an Army civilian public affairs officer. Brigadier General Eder has commanded at the company, battalion and brigade levels. Prior to her current assignment she served as commander of the 6th Brigade (Professional Development), 80th Division (Institutional Training) while concurrently serving on active duty as chief of staff with the Reserve Forces Policy Board in the Office of the Secretary of Defense. She has served at the US European Command in Stuttgart, Germany as the deputy director of public affairs and at the George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany as the director of public affairs. Before her European assignments, Brigadier General Eder served as director of public affairs at the US Army Combined Arms Support Command and Fort Lee and in a variety of reserve positions as both a military police and public affairs officer.

Mr. David Fisher is the senior legal research officer for the International Federation of Red Cross and Red Crescent Societies' International Disaster Response Laws, Rules, and Principles (IDRL) Programme, based in Geneva, Switzerland. Previously, Mr. Fisher held legal research posts for the Office of the United Nations High Commissioner for Human Rights, the Brookings Institution's University of Bern Project on Internal Displacement and the Georgetown University Institute for the Study of International Migration. Mr. Fisher earned his Juris Doctor degree in 1997 from the University of California's Hastings College of the Law and his Master of Laws degree in international and comparative law from the Georgetown University Law Center in 2002. His US legal experience has included both civil and criminal trial advocacy and a clerkship with the Honorable Stephen H. Levinson of the Hawaii Supreme Court.

Captain Dana A. Goward, US Coast Guard (Ret.), is the US Coast Guard's director of Maritime Domain Awareness (MDA) Program Integration. His responsibilities include development and coordination of maritime surveillance and decision support systems, and coordination of US Coast Guard efforts with international and domestic partners. He and his staff also serve as the executive secretariat for the US

National MDA Implementation Team, which is composed of members from across the federal government. Captain Goward is a retired Coast Guard officer who, when on active duty, served afloat, as a federal magistrate, as a regional director of human resources and as the director of the world's largest public safety and security boat operation. Most of his military career, however, was spent as a helicopter pilot and he was the commanding officer of the Coast Guard's air station in New Orleans.

Vice Admiral Lowell E. Jacoby, US Navy, is the director, Defense Intelligence Agency. His first sea duty tour was as an intelligence officer with Fighter Squadron Twenty-Four, flying F-8Js off *USS Hancock*. Following a combat deployment, he served with the Seventh Fleet Detachment in Saigon, Republic of Vietnam. A series of shore and sea duty assignments followed his return from Vietnam. Vice Admiral Jacoby has served as the command's senior intelligence officer in each assignment he has held, dating back to October 1985. These include Carrier Group Eight, Second Fleet/JTF 120, Naval Military Personnel Command and US Pacific Fleet. He was the second commander, Joint Intelligence Center Pacific and director for intelligence, US Pacific Command. He served as commander, Office of Naval Intelligence, fifty-seventh director of Naval Intelligence and Joint Staff J-2 before assuming his present duties.

Captain Kurt A. Johnson, JAGC, US Navy, is the staff judge advocate for the commander of the North American Aerospace Defense Command and US Northern Command at Peterson Air Force Base, Colorado. His initial assignments included tours of duty at Naval Legal Service Office, Guam; Naval Air Station, Whidbey Island, Washington; and at the Port Hueneme Detachment of Naval Legal Service Office, Long Beach, California. In 1990, Captain Johnson began duties as flag aide to the judge advocate general of the Navy and served in that capacity at the Pentagon until 1992. Upon completion of his postgraduate studies in international law at the University of Virginia in 1993, he was assigned as staff judge advocate for the commander, Carrier Group Six (*USS America*) Battle Group. Captain Johnson's following assignments included service on the staffs of the commander in chief, US Pacific Fleet and commander in chief, US Pacific Command, and as the executive officer, Trial Service Office East, Norfolk, Virginia. In January 2000, he became commanding officer, Trial Service Office East before returning to duties as executive officer in September 2000. In August 2001, Captain Johnson became the force judge advocate for commander, US Naval Forces Central Command, and fleet judge advocate for commander, US Fifth Fleet, in Manama, Bahrain, and served in that capacity during Operations Enduring Freedom and Iraqi Freedom. In August

2003, Captain Johnson took command of Naval Legal Service Office Central, headquartered in Pensacola, Florida.

Professor Stuart Kaye was appointed dean of law at the University of Wollongong in July 2002. Prior to his appointment, he was head of the Law School at James Cook University in Cairns. He is admitted as a solicitor of the Supreme Court of New South Wales and as a barrister of the supreme courts of Tasmania and Queensland and of the High Court of Australia. Professor Kaye has an extensive research interest in the law of the sea and international law generally, and has published extensively in these areas. He has written a number of books, including *Australia's Maritime Boundaries*, *The Torres Strait* and *International Fisheries Management*. He was appointed by Australia to the International Hydrographic Organization's Panel of Experts on Maritime Boundary Delimitation in 1995 and in 2000 was appointed by Australia to the list of arbitrators under the 1991 Madrid Protocol to the Antarctic Treaty. Professor Kaye is the current national chair of the Australian Red Cross International Humanitarian Law Committee. In 2007, he will take up a chair in law at the University of Melbourne.

Secretary Paul McHale is the assistant secretary of defense for homeland defense. In this position, he is responsible for the supervision of all homeland defense activities of the Department of Defense. In 1972 Secretary McHale entered the US Marine Corps and spent two years on active duty, including an overseas deployment as a rifle platoon leader in Okinawa and the Philippines. After release from active duty, Secretary McHale entered Georgetown Law Center in 1974 and received his Juris Doctor degree in 1977. For the next five years, he practiced law in Bethlehem, Pennsylvania. Secretary McHale began his civilian public service career in 1982 when he was elected to the Pennsylvania House of Representatives, where he served five consecutive terms. He resigned in 1991 following Iraq's invasion of Kuwait, volunteering for active duty as an infantry officer with the Marine Corps during Operations Desert Shield and Desert Storm. In January of 1993, Secretary McHale was elected to represent the 15th Congressional District of Pennsylvania in the US House of Representatives, where he served for three terms. He is currently a colonel in the Marine Corps Reserve. Secretary McHale has frequently lectured on government, law and military policy on the campuses of many colleges and universities, including the US Army War College, where he is an adjunct professor, and the US Naval Academy, where he served as a member of the Board of Visitors. Secretary McHale is a former member of the Board of Advisors at the US Naval War College. In 1999, then congressman McHale retired from the House of

Representatives and became a shareholder in the Allentown law firm of Tallman, Hudders & Sorrentino, PC. He assumed his current position on February 7, 2003.

Professor Francisca Möller teaches international law at Chile's Academia de Guerra Naval (Naval War College) in Valparaiso. From 1982 to 2001, she served as a legal adviser for the Chilean Navy at the Maritime Authority (General Maritime Directorate). Professor Möller is a member of the Board of the Chilean Society of International Law, a member of the Chilean Society of Maritime Law and a researcher at the Center for Strategic Studies of the Navy.

Vice Admiral John G. Morgan Jr., US Navy, is the deputy chief of naval operations for information, plans and strategy (N3/N5). He graduated from the University of Virginia in 1972 with a degree in economics. His sea tours include duty in a diesel submarine, a frigate, a guided-missile destroyer, an *Aegis* destroyer and cruiser and a destroyer squadron, as well as on the Second Fleet staff. Major deployments during those tours span duty in the US Pacific Command, US Southern Command, US European Command and US Central Command areas of responsibility. Command tours include the commissioning of *USS Arleigh Burke*; commander, Destroyer Squadron 26 in the *USS George Washington* Carrier Battle Group; and commander, *USS Enterprise* Carrier Battle Group, which participated in the first strikes of Operation Enduring Freedom in Afghanistan. Between tours at sea, Vice Admiral Morgan was assigned to the Joint Chiefs of Staff, the Office of the Chief of Naval Operations, the Ballistic Missile Defense Organization and the Naval Surface Forces staff in the Pacific. As a flag officer, his assignments ashore include duty as the deputy for acquisition strategy in the Ballistic Missile Defense Organization and the senior military assistant to the secretary of the Navy.

Rear Admiral Joseph L. Nimmich, US Coast Guard, is the assistant commandant for policy and planning. Prior to this assignment, he served as director of the Maritime Domain Awareness Program Integration Office. His twenty-seven-year career as a Coast Guard officer has been divided between operational assignments ashore and afloat, and staff assignments in the resource management field. Rear Admiral Nimmich has served aboard the cutters *USCGC Woodrush* and *USCGC Mesquite* and he has commanded the cutters *USCGC Point Estero*, *USCGC Red Beech* and *USCGC Sorrel*. Rear Admiral Nimmich has also served as commander, Coast Guard Group Key West and has held various staff assignments in both districts and headquarters, including in the Office of Operational Law Enforcement and the Office of Budget and Planning and Policy and as deputy chief of staff of the Coast Guard.

Professor Harvey Rishikof holds the Chair, Department of National Security Strategy and is a professor of law and national security studies at the National War College in Washington, DC. He specializes in the areas of national security, civil and military courts, terrorism, international law, civil liberties and the US Constitution. His career includes experience in both teaching and public service. He has served as the legal counsel to the deputy director of the FBI (1997–99) and as the administrative assistant to and chief of staff for the chief justice of the US Supreme Court (1994–96). At the National War College, Professor Rishikof has taught courses in national security law, civilian/military relations and governmental process. As dean of the Roger Williams University School of Law, Bristol, Rhode Island (1999–2001), he introduced courses in national security law and the Constitution at the US Naval War College. He has authored numerous articles on subjects in which he specializes. Professor Rishikof's most recent writings have appeared in such publications as the *Villanova Law Review*, *The Yale Journal of International Law*, *100 Americans Making Constitutional History* (Melvin Urofsky, editor), the *Suffolk Journal of Trial & Appellate Advocacy*, *The Providence Journal* and *The New York Times*.

Ms. Linda Robinson is a senior writer for *U.S. News & World Report* specializing in national security issues. She received the Gerald R. Ford Prize for Distinguished Reporting on National Defense in 2005. She was a Nieman Fellow at Harvard University and was awarded the Maria Moors Cabot Prize by Columbia University. She has also been a Senior Consulting Fellow at the International Institute for Strategic Studies and a Media Fellow at Stanford's Hoover Institution. Before joining *U.S. News* in December 1989, Ms. Robinson was senior editor at *Foreign Affairs* magazine. Her book about the US Army Special Forces, *Masters of Chaos*, was published in 2004. Since September 11, 2001, Ms. Robinson's work has focused on terrorism and national security. She has written cover stories for *U.S. News* on US counterterrorism strategy, intelligence reform, the counterinsurgency in Iraq, the hunt for Osama bin Laden and the US Special Operations Command. As bureau chief for Latin America in the 1990s, she covered democratic transitions, coups, six insurgencies and US military operations in Panama and Haiti. Ms. Robinson's work has been published in *Foreign Affairs*, *World Policy Journal*, *Survival*, *SAIS Review*, *The New Republic*, *The New York Times*, *Outside*, *Condé Nast Traveler* and elsewhere. She appears frequently on cable and public television programs to discuss military and international issues. Ms. Robinson is a member of the Council on Foreign Relations and the International Institute for Strategic Studies.

Doctor Yann-Huei Song is executive editor of the *Chinese (Taiwan) International and Transnational Law Review* and presently a Fulbright visiting scholar at the Shorenstein Asia-Pacific Research Center, Stanford University. He received a doctoral degree in international relations from the Department of Political Science, Kent State University, Kent, Ohio, and Master of Laws and Juris Doctor degrees from the School of Law (Boalt Hall), University of California at Berkeley. He is a research fellow at the Institute of European and American Studies, Academia Sinica, Taiwan, and adjunct professor at National Taiwan Ocean University. Dr. Song's research interests are in the fields of the law of the sea, international fisheries law, national ocean policy studies, naval arms control and maritime security. He has published articles in journals such as the *Political Geography Quarterly*, *Asian Survey*, *Marine Policy*, *Chinese Yearbook of International Law and Affairs*, *The American Asian Review*, *Ocean Development and International Law*, *Ecology Law Review*, *International Journal of Coastal and Marine Law* and *The Indonesian Quarterly*. Dr. Song is the author of a book entitled *The United States and the South China Sea Dispute: A Study of Ocean Law and Policy*.

Colonel James P. Terry, US Marine Corps (Ret.), serves as the chairman of the Board of Veterans' Appeals. He previously served as principal deputy assistant secretary and deputy assistant secretary for regional, global and functional affairs with the Bureau of Legislative Affairs at the Department of State from 2001–05. Commissioned in 1968, Colonel Terry served as an infantry officer in Vietnam and as commanding officer of a Marine detachment aboard the *USS Ticonderoga*. Following his graduation from law school at Mercer University in 1973, he served as a Marine Corps judge advocate until his retirement as a colonel in 1995. He served his final four years of active duty as legal counsel to the chairman of the Joint Chiefs of Staff. Following his retirement, he accepted a position in the Senior Executive Service in the Department of the Interior. He served as deputy director of the Office of Hearings and Appeals with responsibility for managing the department's administrative law judge system. He later served as a judge on the Board of Land Appeals with responsibility for adjudicating offshore oil and gas royalty cases. In July 2001, he left the Interior Department to accept the appointment in the Department of State. Colonel Terry has written more than twenty-five articles on coercion control and national security law. He is currently completing a book on Soviet military intervention in former Warsaw Pact States for the period 1945 to 1991.

Rear Admiral Frank Thorp IV, US Navy, is the deputy assistant secretary of defense (joint communication), where he is responsible for overseeing Department of Defense activities directed at shaping department-wide communications

doctrine, organization and training for the joint force. Prior to this assignment, he was the special assistant for public affairs to the chairman of the Joint Chiefs of Staff. During Operation Iraqi Freedom, Rear Admiral Thorp was deployed to Qatar as the chief of media for US Central Command (forward). From 2000 to 2003 he served as special assistant for public affairs to the chief of naval operations. His other assignments have included public affairs officer for the Bureau of Naval Personnel; Naval Surface Forces, US Pacific Fleet; Joint Task Force Middle East; Cruiser Destroyer Group Twelve; and *USS Dwight D. Eisenhower*. He has also served as director of public affairs and congressional notification at the Navy's Office of Legislative Affairs. Rear Admiral Thorp has also had several assignments at the Navy's Office of Information. Prior to specializing in public affairs, Rear Admiral Thorp served as a surface warfare officer forward deployed to Sasebo, Japan.

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he cofounded the Center for National Security Law. He has served as its associate director since then except for two periods of government service in the 1980s and during 1994–95, when he occupied the Charles H. Stockton Chair of International Law at the US Naval War College. A veteran of two Army tours in Vietnam, he has served in the Pentagon as special assistant to the under secretary of defense for policy, in the White House as counsel to the president's Intelligence Oversight Board, at the State Department as principal deputy assistant secretary for legislative affairs, and as the first president of the congressionally established US Institute of Peace. Professor Turner is a former three-term chairman of the American Bar Association's Standing Committee on Law and National Security (and for many years editor of the *ABA National Security Law Report*). He is the author or editor of a dozen books and monographs, and of numerous articles in law reviews and professional journals. Professor Turner has testified before more than a dozen different congressional committees on issues of international or constitutional law and related topics. He is a member of the Committee on Present Danger, the Council on Foreign Relations and other professional organizations.

Professor Bakhtiyar R. Tuzmukhamedov is the counselor to the Constitutional Court of the Russian Federation. He provides international legal advice both to judges and to the secretariat of the court. He concurrently serves as professor of international law at the Diplomatic Academy of the Russian Foreign Ministry. In 1994–95 he was a civil affairs officer with the UN peacekeeping forces in the former Yugoslavia. In 1999–2003 he was a member of the group of experts on the International Committee of the

Red Cross's study on the customary rules of international humanitarian law. Professor Tuzmukhamedov has authored and coauthored several books published in the former USSR and in Russia, as well as in the United States and elsewhere. He has also authored numerous scholarly articles and has been a regular contributor to major national newspapers. Professor Tuzmukhamedov is deputy editor in chief of the *Moscow Journal of International Law* and a member of the Editorial Board of the *International Review of the Red Cross*. He is a member of the Executive Committee of the Russian Association of International Law and formerly a rapporteur of the Committee on Arms Control and Disarmament Law of the International Law Association.

Brigadier General Ikram ul Haq, Pakistan Army, joined Headquarters, US Central Command as Pakistan's senior national representative on October 4, 2005. Before assumption of this assignment, he commanded an independent infantry brigade. Brigadier General ul Haq was commissioned in the Pakistan Army as an infantry corps officer in April 1981. He has had various command appointments, including company commander, battalion commander of an infantry battalion and an antitank battalion. His staff appointments were as a general staff officer, grades I and II (operations). He is a graduate of Pakistan's Command and Staff College and National Defence College, and of the Royal Jordanian War College. Brigadier General ul Haq has served in Bosnia as part of the United Nations peacekeeping mission. He has extensive experience performing internal security and disaster relief duties in Pakistan.

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